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TITLE VII INTERPRETATION AND ENFORCEMENT IN THE REAGAN YEARS (1980-89): THE WINDING ROAD TO THE CIVIL RIGHTS ACT OF 1991

BY WILLIAM A. WINES*

INTRODUCTION

Not waiting for such changes to become law, the Reagan Administration in its first year in office began using executive powers to dismantle the government machinery protecting women against sex discrimination in employment and education. Budget cuts slashed long-standing government services vital to women and families

—Betty Friedan (1981)¹

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1. BETTY FRIEDAN, *THE SECOND STAGE* 237-38 (1981).

What impact did the politics of Ronald Reagan and George Bush have on the interpretation and enforcement of Title VII, the Equal Employment Opportunity Title of the 1964 Civil Rights Act?² This Article addresses that question by examining the political statements, enforcement budgets, federal court decisions, and changes in personnel on the federal bench during the eight years of the two Reagan administrations. One outcome of the Reagan-Bush policies was the Civil Rights Act of 1991,³ which reversed some of the Rehnquist Court's rulings limiting a plaintiff's access to relief in employment discrimination cases.

Ronald Reagan's two terms as President provided him the opportunity to reshape the federal judiciary, which, in turn, began to re-examine the principles underlying Title VII of the 1964 Civil Rights Act.⁴ More than any other president before him, Ronald Reagan sought to screen his nominees for ideological purity;⁵ by 1991 the law of employment discrimination substantially reflected the values of the new and more conservative jurists whom he and his heir apparent had appointed. However, even after George Bush's four years in the White House, the political rhetoric still obscures some less dramatic but very effective assaults by the Reagan and Bush administrations on affirmative action. These assaults in the areas of budgets and administrative policies, as suggested by Ms. Friedan, have had a significant impact on the quality of life and justice in this country even as coverage of them in the popular press and scholarly journals continues to be modest.⁶

The first substantial judicial modification of equal employment opportunity law came at the end of the Reagan era in two cases: *Watson v. Fort Worth Bank and Trust*⁷ and *Wards Cove Packing Co. v. Atonio*.⁸

2. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-15 (1976).

3. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

4. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-15 (1976).

5. See, e.g., D.G. SAVAGE, TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992); Ted Gest, *Inside Rehnquist's Court*, U.S. NEWS & WORLD REP., Oct. 8, 1990, at 32-35; Bernard Weintraub, *Reagan Says He'll Use Vacancies to Discourage Judicial Activism*, N.Y. TIMES, Oct. 22, 1985, at A1; Stephen Wermiel, *Some Reagan Judicial Appointees Fail to Follow Conservative Path Expected by Administration*, WALL ST. J., April 5, 1988, at 60; Tom Wicker, *Splendid for Starters*, N.Y. TIMES, May 6, 1986, at A31.

6. Perhaps the riots in Los Angeles in May 1992 following the not-guilty verdict in the Rodney King police brutality trial will bring more national scrutiny to the impact of hopelessness on the lives of women and people of color. It is too early to say whether our national attention span will entertain serious inquiries. Similar questions about our national progress in employment of women might be raised after national news programs spotlighted sexual harassment at the Navy's Tailhook Association meeting in June 1992. *This Week with David Brinkley* (ABC television broadcast, June 18, 1992).

7. 487 U.S. 977 (1988).

8. 490 U.S. 642 (1989).

Sandra Day O'Connor, the first Reagan appointee to the Supreme Court, wrote a plurality opinion in *Watson*, which was then endorsed by a majority of the Court a year later in *Wards Cove* when Justice Anthony Kennedy, the last Reagan appointee, provided the decisive fifth vote. The impact of these decisions, discussed later in this article,⁹ was to blur the established distinctions between disparate treatment and disparate impact cases. The cases seemed to be an initial move toward re-examination of the entire doctrine of disparate impact and the statistical case, which had been announced by a unanimous court in *Griggs v. Duke Power Co.*¹⁰ This maneuver was stymied by congressional renunciation of the *Watson* and *Wards Cove* decisions in the Civil Rights Act of 1991.¹¹

The more-than-eight-year lag between the first inauguration of Ronald Reagan and the first significant Supreme Court assault on Title VII should alert future presidents that the implementation of policy changes through personnel changes in the judiciary is a long, slow process.¹² We can compare U.S. government policy changes to the navigation of a supertanker.¹³ One does not see the results of any effort to back water or change course for a considerable time. Yet, like a supertanker's change of direction, when the course correction has been implemented by a shift in judicial staffing, it may take decades to see the full effect. In the 1930s, President Franklin D. Roosevelt experienced frustrations similar to those Reagan must have felt when an entrenched probusiness, conservative Supreme Court repeatedly invalidated parts of FDR's New Deal legislation for revitalizing the U.S. economy.¹⁴

9. See *infra* notes 97-306 and accompanying text.

10. 401 U.S. 424 (1971).

11. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1074-76 (amending 42 U.S.C. 2000e-2 (1976)).

12. For instance, a Justice Department spokesperson responded to a setback in advancing the Reagan-Meese-Reynolds agenda by saying that what the administration needed to help its program was "a justice or two" — a reference to some changes in personnel on the Supreme Court. See *infra* text accompanying notes 25-96.

13. Anyone interested in how difficult it is to stop or even turn one of the huge supertankers should read a detailed account of the Exxon Valdez accident on Prince William Sound, Alaska. At a top speed of 15-16 knots, an ultra-large crude oil carrier takes three miles and twenty minutes to stop. See Abe Dane, *America's Oil Tanker Mess*, POPULAR MECHANICS, Nov. 1989, at 52. When the Exxon Valdez ran aground on the rocks in Prince William Sound, it was traveling at approximately 12 knots. *Id.* at 51. Nearly 11 million gallons of crude oil spilled into the sound on March 24, 1989. *Id.* at 52. The crude oil burst from the hull with enough force to create a wave three feet high. *Id.* at 51.

14. William E. Leuchtenburg, *FDR's Court Packing Plan: A Second Life, A Second Death*, 1985 DUKE L.J. 673.

In 1985, Professor Lawrence Tribe of Harvard, an experienced Court watcher and constitutional law specialist, wrote a book on the historical impact of Supreme Court Justice selection that offered slight hope to liberals distraught at the thought of four more years.¹⁵ After reciting William Rehnquist's 1984 dictum that Justices come to the Court "one at a time" and are swallowed up by the institution,¹⁶ Tribe said that in many ways even one Justice can make a crucial difference in American life.¹⁷ Approximately 20% of the Supreme Court's decisions from 1974 to 1984 were decided by only one vote.¹⁸

Yet looking at the court in 1985, Tribe declared that "[a]ny Court as delicately balanced as that of the 1980s is capable of being thrown squarely to one side of the ideological divide by an appointment that upsets still narrow margins on key questions."¹⁹ Since that comment, four conservative Justices have taken seats on the Court: Antonin Scalia, Anthony Kennedy, David Souter, and Clarence Thomas. If one appointment could throw the Court across an ideological divide, four ought to cement its place in a conservative pantheon. However, as Tribe also suggested, the complexity of individual personalities sometimes makes generalities difficult.²⁰ Tribe supported this observation by reviewing the record of President Reagan's 1981 appointee, Justice O'Connor, who, although she voted with Justice Rehnquist in 87% of the cases and was generally more conservative than her predecessor, was more liberal than he had been on sex discrimination rulings.²¹ Tribe concluded: "Defying the desire of Court watchers to stuff Justices once and for all into pigeonholes of 'right' or 'left,' this story, too, is fairly typical: when one Justice is replaced with another, the impact on the Court is likely to be progressive on some issues, conservative on others."²²

In the November 1986 elections, the Democrats regained control of the U.S. Senate, re-establishing a Democratic majority that had been swept away in the 1980 Reagan landslide.²³ This change slowed the appointment of Reagan judges for at least two reasons: first, the nominees received closer scrutiny; second, the administration exercised more care

15. LAWRENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* (1985).

16. *Id.* at 31.

17. *Id.*

18. *Id.* at 31-32.

19. *Id.* at 35.

20. *Id.* at 40.

21. *Id.* at 38-40.

22. *Id.* at 40.

23. HAYNES JOHNSON, *SLEEPWALKING THROUGH HISTORY: AMERICA IN THE REAGAN YEARS 1981-86* (1991).

in selecting nominees to avoid giving the opposition any more ammunition for the 1988 election. Professor Tribe's book well may have provided motivation for the Democratic Senators who resisted President Reagan's second term judicial nominations, the most memorable of which was the battle over Robert Bork's nomination in 1987.

This Article is divided into seven major parts. Part I examines the battles over the nominations that President Reagan sent to the Senate. Part II provides an analysis of selected 1985 U.S. Courts of Appeals decisions in Title VII cases to determine whether any meaningful relationship existed between the identity of the appointing President and a judge's voting pattern on employment discrimination cases. Part III summarizes significant Title VII decisions handed down by the U.S. Supreme Court between 1981 and 1989. An analysis of the voting patterns of the justices on Title VII cases is presented in Part IV. Support for enforcement of Title VII is examined in Part V. The most significant Title VII case in the period, *Watson v. Fort Worth Bank and Trust*,²⁴ is examined in detail in Part VI. Finally, Part VII examines the 1991 Civil Rights Act. In whole, this Article is designed to provide the reader with a comprehensive overview of the Reagan legacy in the area of federal fair employment practices.

I. NOMINATIONS AND BATTLE STATIONS

There were 736 federal judges with lifetime appointments actually sitting in courts of general jurisdiction in the United States at the end of January 1989. Of those judges, President Reagan had named 346, not quite half of them.²⁵ The naming of more than half the federal judiciary is a feat accomplished by only two presidents in recent history.²⁶ President Reagan had installed a relatively painstaking process for screening

24. 487 U.S. 977 (1988).

25. Telephone Interview with Professor Sheldon Goldman, University of Massachusetts at Amherst (Sept. 24, 1992). Professor Goldman cited his article entitled *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319 (1989). Professor Goldman also indicated that as of September 1992, Mr. Reagan's appointees still in active service numbered only 323, but the percentage of Reagan appointees was down to 39% since 85 judgeships were added in 1990. *Id.* at 318 n.4. These numbers were not up to the levels estimated by court observers even as late as 1987. For instance, as of December 31, 1987, one study showed that only three of some 350 nominees for federal judgeships had been forced to withdraw; only one nominee named by Reagan had been actually defeated in the U.S. Senate. With over one year remaining in office, Ronald Reagan would likely name well over 50% of the sitting federal judges. HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION 9 (1988).

26. Robert Friedman & Stephen Wermiel, *Stacked Bench: Reagan Appointments to the Federal Bench Worry U.S. Liberals*, WALL ST. J., Sept. 6, 1985, at 1.

candidates for judicial office.²⁷ The process involved the following five steps:

- I. Nomination by U.S. Senators from the state with the vacancy (district court);
- II. Justice Department background search;
- III. Interviews by several Justice Department officials who probe views about:
 - a. federal courts' role,
 - b. death penalty,
 - c. *Roe v. Wade*²⁸ (abortion decision),
 - d. favorite Supreme Court Justice;
- IV. Approval of U.S. Attorney General;
- V. Review at weekly meeting of high-level White House committee watched over by Fred Fielding, the White House counsel.²⁹

Liberals claimed the White House was applying overtly ideological standards to the selection of judges in an attempt to reshape entire areas of federal law. Indeed, in the 1980 campaign, Reagan pledged to appoint a new generation of conservative judges who would reverse what he said was a tendency to use the courts for social activism.³⁰ Attorney General Meese reiterated this strict-constructionist approach in the summer of 1985.³¹

By the start of his second term, President Reagan had appointed more than 200 (27%) district and appeals court judges and one Supreme Court Justice, Sandra Day O'Connor. The profile of first-term appointees showed:

98% Republican,
93% white,
92% male,
90% from non-ivy league law schools,
25% millionaires (approximately),
10% under 40 years of age
(approximately),
5% Jewish (12 appointees).³²

27. *Id.*

28. 410 U.S. 113 (1973).

29. Friedman & Wermiel, *supra* note 26, at 1.

30. SAVAGE, *supra* note 5, at 424.

31. Attorney General Edwin Meese III, Address Before the American Bar Association (July 17, 1985).

32. Sheldon Goldman, *Reagan's Judicial Appointments at Mid-term: Shaping the Bench in His Own Image*, 66 JUDICATURE 335, 338-39, 344-45 (1983).

In the 1984 campaign, Walter Mondale and the Democrats raised the issue of judicial appointments, focusing particularly on anticipated appointments to the Supreme Court during the second term.³³ However, if President Reagan's appointees do not all toe the party line, it will not be the first time. One of the best illustrations at the Supreme Court level is President Eisenhower's appointment of Earl Warren as Chief Justice.³⁴ Warren had been a district attorney in California, a law-and-order attorney general, and the Governor of California who supported internment of the Japanese during World War II.³⁵ His selection as Chief Justice did not raise concerns that it would launch a new civil rights era. Yet, before the end of his second term, Eisenhower said the Warren appointment was "the biggest damn-fool mistake I ever made."³⁶

There have been several significant personnel changes on the Supreme Court since January 1981. None will prove more significant than the departures of William J. Brennan, Jr., who resigned from the U.S. Supreme Court on Friday, July 20, 1990 after thirty-four years on the court,³⁷ and the departure less than one year later of Thurgood Marshall, the first black man to sit on the Supreme Court, after twenty-four years of service.³⁸ However, the changes before 1989 were vitally significant in laying the foundation for the Court's turn to the right. In 1981, a newly elected President Reagan appointed Sandra Day O'Connor to the Court upon the retirement of Potter Stewart.³⁹ In May 1986, Reagan appointed William Rehnquist, "the most reactionary justice in modern times,"⁴⁰ to succeed Chief Justice Warren Burger and Antonin Scalia of the D.C. Circuit to fill the empty chair.⁴¹ President Reagan's last appointment to the high Court involved elevating Anthony Kennedy of the

33. See, e.g., *Where Reagan and Mondale Stand on Key Issues*, N.Y. TIMES, Nov. 4, 1984, at 36.

34. BERNARD SCHWARTZ & STEPHEN LESHER, *INSIDE THE WARREN COURT* (1983).

35. *Id.* at 8-13.

36. *Id.* at 92.

37. Stephen Wermiel, *Legal Watershed: High Court Vacancy is Threat to Abortion, Opportunity for Bush*, WALL ST. J., July 23, 1990, at A1.

38. Thurgood Marshall resigned on Thursday, June 27, 1991. See, e.g., Stephen Wermiel, *Hard Right: Conservatives Lock Up Control of High Court as Marshall Retires*, WALL ST. J., June 28, 1991, at A1. For an excellent treatment of Justice Marshall's life, see MICHAEL D. DAVIS & HUNTER R. CLARK, *THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH* (1992).

39. SCHWARTZ, *supra* note 25, at 63.

40. *Id.* at 110.

41. *Id.* at 117-118.

Ninth Circuit to take the seat vacated by Lewis Powell, a Nixon appointee, in June 1987.⁴²

Yet, as important as these judicial appointments are to understanding the Court's turn to the right,⁴³ the defeat of three critical Reagan nominations may be equally significant in determining the outer limits of that change in direction. In 1985, William Bradford Reynolds was rejected by the Senate as a nominee for the position of Associate Attorney General. This was a key rejection that presaged the battle the following year over Rehnquist's elevation to Chief Justice and the defeats of the nominations of Robert Bork and Douglas Ginsburg to the high Court in 1987.⁴⁴ These three defeats may have signified the public's unwillingness to accept an ideologically rigid right-wing Court. Let us now turn to the Reynolds nomination.

"Those who oppose [William Bradford] Reynolds[']s nomination] favor inflicting injuries on persons who are guilty of no unlawful behavior and who have benefitted from no unlawful behavior, and who are to be injured solely because of their sex or skin pigmentation."⁴⁵ So wrote George Will, one of the most visible of the conservative commentators with access to the Reagan White House. Will reflected the themes of the Reagan forces as they girded for battle in 1985 as well as the Republican Party line, which was announced by the following words in the platform: "Just as we must guarantee opportunity, we oppose attempts to dictate results. We will resist efforts to replace equal rights with discriminatory quota systems and preferential treatment. Quotas are the most insidious form of discrimination: reverse discrimination against the innocent."⁴⁶

42. *Id.* at 144, 148-49.

43. See, e.g., SAVAGE, *supra* note 5; David O. Stewart, *Civil Rights: Just a Trim?*, A.B.A. J., Aug. 1989, at 40-45; Gest, *supra* note 5.

44. SCHWARTZ, *supra* note 25, at 119-48.

45. George Will, *Battling the Racial Spoils System*, NEWSWEEK, June 10, 1985, at 96.

46. *A Free and Just Society*, 42 CONG. Q. WKLY. REP. 2107 (1984). The code word "Quotas" appears to have gained almost institutional significance. Andrew Hacker makes such a point in the following passage:

Apart from some blatant Willie Horton episodes, racial references tend to be conveyed in nuances and codes, including allusions to crime and comments on quotas. In his 1990 campaign for another Senate term, Jesse Helms of North Carolina confined his overtures to white voters. "You needed that job, and you were the best qualified," one of his commercials ran. "But it had to go to a minority because of a racial quota." White voters from all regions and classes have little trouble intuiting where candidates like Helms stand.

ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 202 (1992).

On the other side of this debate, we heard plenty of doubts and some despair about whether the civil rights advances of the 1960s would survive a second Reagan administration. "We've been living on the gas-tank fumes of the protest of the 1960's - and the gas-tank is empty. We've got to do it all over again."⁴⁷ Those in Congress who opposed the Reynolds nomination sounded a different battle cry as they prepared to join the issue with their colleagues across the aisle: "To claim that there is strict color and gender-blindness in a society that is not color and gender-blind only perpetuates discrimination and circumvents the law."⁴⁸

In this way, furor over President Reagan's nomination in 1985 of William Bradford Reynolds to the Justice Department's number-three spot put into focus many of the issues raised during President Reagan's first term regarding Title VII interpretation and enforcement. The Reynolds nomination ultimately failed to clear the Senate Judiciary Committee, and Reynolds retired to his old post as civil rights chief.⁴⁹

On June 5, 1986, by a narrow 10-8 party-line vote, the Senate Judiciary Committee rejected the first judicial nominee since President Carter's administration.⁵⁰ But it took a remarkable nomination to generate that single downturn for President Reagan's campaign to redesign the federal courts: Jefferson Sessions, the federal prosecutor in Mobile who called a black aide "boy" and described a white civil-rights lawyer as a "disgrace to his race."⁵¹ Sessions failed to earn the vote of one of the Alabama senators, Howell Heflin, in his bid for committee approval. What amazed some observers was not that the nomination was defeated, but that it could muster eight votes.⁵²

By July 1985, the frustration with which civil rights activists and political liberals viewed the Reagan policies and the prospect of four more years boiled over. In an unprecedented move, the National Association for the Advancement of Colored People (NAACP) sued Attorney General Ed Meese in the U.S. District Court for the District of Columbia seeking an order enjoining the Attorney General and the Department of

47. *Federal Tax Bite—State by State*, U.S. NEWS & WORLD REP., July 15, 1985, at 14.

48. Don Edwards, *Quotes*, A.B.A. J., Aug. 1985, at 35.

49. David A. Alpern, *A Roadblock for Reynolds*, NEWSWEEK, July 8, 1985, at 43.

50. Stephen Wermiel, *Reagan Nominee for the Federal Bench is Rejected by Senate Judiciary Panel*, WALL ST. J., June 6, 1986, at 62.

51. *Senate Panel Defeats Reagan Choice: "Racist" Label Sinks Court Nominee*, U.S. NEWS & WORLD REP., June 16, 1986, at 8.

52. Wermiel, *supra* note 50.

Justice from reopening or consenting to the reopening of any decree in any action brought by the government under Title VII.⁵³

Essentially, the dispute was over *Firefighters Local Union No. 1784 v. Stotts*,⁵⁴ which contained language about employment goals and timetables for minorities and women not proven to be "actual victims" of discrimination.⁵⁵ The NAACP sought to have the Attorney General and the Justice Department enjoined based on an Administrative Procedures Act (APA) provision allowing for judicial review of final federal agency action for which there is no other adequate judicial remedy.⁵⁶ On July 2, 1985, Judge Harold H. Greene held that his court lacked authority under the APA or any executive order to enjoin the Attorney General from exercising prosecutorial discretion to reopen or consent to reopen any Title VII decrees.⁵⁷ The fact that the action was denied is not as remarkable as the vast distrust manifested by such an unprecedented attempt at judicial restraint of the executive branch.

Although the NAACP despaired, there were mixed perceptions in the media as to the role of the U.S. Supreme Court in Title VII cases. One commentator suggested that the U.S. Supreme Court was activist, but less activist than the Ninth Circuit Court of Appeals.⁵⁸ Certainly, there was some confusion in the media as to where the line was drawn between Reagan administration appointees, such as William Bradford Reynolds and Ed Meese, and the function of the federal judiciary. This confusion left the impression that the entire federal government was moving to the right. However, after the 1982 defeat of the Equal Rights Amendment, feminists and organizations representing them were increasingly dependent upon the judiciary.⁵⁹

The debate over Title VII continued, and in 1986 the nation witnessed the elevations of William Rehnquist to Chief Justice and Antonin

53. NAACP v. Meese, 615 F. Supp. 200, 206 (D.C.D.C. 1985).

54. 467 U.S. 561 (1984).

55. *Id.* at 578-81.

56. *Meese*, 615 F. Supp. at 206.

57. *Id.* at 204-06. In part, Judge Greene ruled:

It may well be that plaintiffs are correct in their interpretation of *Stotts*, but the Supreme Court's opinion in that case is sufficiently Delphic that a contrary construction cannot with certainty be ruled out. . . . This District Court is not the appropriate forum for a nation-wide determination of the meaning of *Stotts* by way of an injunction against the Attorney General.

Id. at 206 (footnote omitted).

58. John S. Baker, *Activists on the Ninth Circuit Strike Out*, WALL ST. J., Sept. 25, 1984, at 28.

59. See generally, Joann S. Lublin, *Where Does the Women's Movement Go Now?*, WALL ST. J., June 29, 1982, at 26.

Scalia from the D.C. Circuit to Associate Justice. The Senate approved the nominations without much of a fight. As to the former, one observer believed that the opposition was reluctant to criticize a sitting justice or open itself to charges that it opposed a nomination on ideological grounds when the only thing at stake was the difference between Rehnquist as Chief and Rehnquist as Associate Justice.⁶⁰ Nonetheless, Rehnquist's nomination as Chief Justice drew the most negative votes in the history of the position.⁶¹ Scalia's nomination to Associate Justice was unanimously approved primarily because of the opposition's preoccupation with the simultaneous Rehnquist nomination and the fact that Scalia was simply replacing the equally conservative Warren Burger.⁶²

In 1987, Ronald Reagan made his most controversial nomination to the Supreme Court, nominating Robert Bork to fill the vacancy created by Lewis Powell's resignation.⁶³ William Bradford Reynolds, who had been given authority to act as Meese's deputy, was running the Justice Department on a day-to-day basis while Meese dealt with his own problems, Wedtech and Iran-Contra, on the hill.⁶⁴ This time, Reynolds had no tolerance for talk about easy-to-confirm nominees.⁶⁵ In this setting, President Reagan sent the name of Robert Bork to the Senate for confirmation to the U.S. Supreme Court.

At least two books have been written about the battle in the U.S. Senate over the Bork nomination.⁶⁶ One commentator saw the setting

60. SCHWARTZ, *supra* note 25, at 115.

61. *Id.* at 117. The vote was 65 to 33, "the largest vote against a chief justice in history."
Id.

62. *Id.* at 118.

63. Wendy Williams, in an essay first published in 1987, succinctly puts into focus the stakes in the 1987 nomination to replace Lewis Powell:

By the time Warren Burger left the Supreme Court, the major equality issues were decided: the earlier flood of decisions had diminished to a trickle. The addition of Antonin Scalia to the Court and the elevation of William Rehnquist to chief justice weakens, but does not radically change, the Court's commitment to gender equality. If given the opportunity by the death or retirement of any of the liberal justices, however, President Reagan will almost certainly transfigure the Court and end its already declining activism on the issue. In any case, the equality the Court's revolution has brought has not fundamentally improved the economic status of women.

Wendy W. Williams, *Sex Discrimination: Closing the Law's Gender Gap*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986* (Herman Schwartz, ed., 1987).

64. SAVAGE, *supra* note 5, at 168.

65. *Id.*

66. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989).

this way: The unexpected retirement of Lewis Powell on June 26 [1987] and the swift nomination of Bork were thus a staggering one-two punch to civil rights and other public-interest groups. If Bork were confirmed, a moderate, humane conservative would be replaced by a rigid, hard extremist.⁶⁷ Ironically, Robert Bork, not unlike President Reagan who had begun his adult life as an FDR New Dealer,⁶⁸ had been a liberal who passed out leaflets for Adlai Stevenson.⁶⁹ However, at the University of Chicago Law School, Bork underwent a conversion experience that swung him sharply to the right.⁷⁰ In a famous 1971 article, Bork laid out his conviction that the only true and neutral sources of constitutional doctrine are the text, the original intention of the framers, and reasonable implications from the governmental processes contained in the text.⁷¹ He attacked court decisions promoting individual liberties in the areas of equality, privacy, and free speech. During the Watergate crisis, Bork had fired Archibald Cox after Elliot Richardson and William Ruckelshaus resigned rather than follow President Nixon's directive to remove the special prosecutor.⁷² Seven years later, Bork published a book in which he called on the courts to "overturn most current antitrust law, and to loosen the restrictions on business to permit almost all mergers and restraints on distribution."⁷³

Howard Baker, White House chief of staff, and Washington lawyer Lloyd Cutler, a Democrat, "did not think the Democrat-controlled Senate would confirm such an ideologue."⁷⁴ Therefore, they spent much time and money trying to repackage Bork as a "moderate conservative" — in the tradition of Harlan, Brandeis, and Frankfurter.⁷⁵ Millions of dollars were spent trying to pressure the Senate into confirming Bork — \$2.5 million was budgeted for one advertising campaign alone.⁷⁶ The strategy backfired as conservatives in the Republican fold were angered that they were being asked to fight for the nomination of a "moderate"

67. SCHWARTZ, *supra* note 25, at 122.

68. GAIL SHEEHY, *CHARACTER: AMERICA'S SEARCH FOR LEADERSHIP* 242-45 (1990); GARRY WILLS, *REAGAN'S AMERICA: INNOCENTS AT HOME* 58-63, 244-45 (1987).

69. SCHWARTZ, *supra* note 25, at 126.

70. *Id.*

71. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

72. ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 24 (1987).

73. SCHWARTZ, *supra* note 25, at 129 (citing ROBERT H. BORK, *THE ANTITRUST PARADOX* 409-13 n.16 (1978)).

74. SCHWARTZ, *supra* note 25, at 125.

75. *Id.*

76. *Id.* at 131.

to the Court; at Justice, Meese and Reynolds were also agitating for a hard sell and a direct ideological confrontation.⁷⁷

For their part, Bork's opponents began organizing as soon as the nomination was announced.⁷⁸ A Bork nomination had been a possibility in 1986, and some analyses of his record had been made by a group called "Supreme Court Watch."⁷⁹ Ultimately, over 300 groups came out against the Bork nomination. "Key roles were played by Planned Parenthood, Common Cause, and the American Civil Liberties Union."⁸⁰

Significant opposition to the nomination existed among Robert Bork's former colleagues in higher education and the bar. Over forty percent of the faculty at accredited law schools signed letters opposing his nomination.⁸¹ Five of the fifteen members of the American Bar Association's Committee on the Federal Judiciary refused to give Bork a "qualified rating" — a first for a Supreme Court nominee since the ABA began evaluating candidates.⁸² Two factors go a long way toward explaining the defeat of the nomination. First, there was little popular support anywhere in the country. Second, the gamble Bork took in giving thirty hours of detailed testimony over five days failed to persuade many listeners — unlike the earlier dramatic testimony of Marine Lt. Col. Oliver North that won over some opponents. Ultimately, on October 6, 1987, the Senate Judiciary Committee chaired by Joseph Biden voted 9-5 against him.⁸³

Robert Bork refused to withdraw, and his nomination went to the Senate floor. The final vote, on October 23, 1987, was 58-42, the largest margin of defeat ever for a Supreme Court nominee.⁸⁴ On the bicentennial of the Constitution, as one observer noted, Americans held a plebiscite on what they wanted from the Court that enforces and interprets the document. The vast majority approved the directions the Court had taken — especially in the areas of equality, privacy, and free speech. Despite the efforts of a very popular President to tilt the Court hard

77. *Id.*

78. *Id.* at 132.

79. *Id.*

80. *Id.*

81. *Id.* at 132-33.

82. *Id.* at 133.

83. SAVAGE, *supra* note 5, at 146.

84. *Id.*

right, the public did not support the addition of Robert Bork to the Supreme Court.⁸⁵

The Ginsburg Fiasco

Decision day for the Reagan White House on the next nominee fell six days after the defeat of the Bork nomination. Howard Baker wanted Anthony Kennedy, a Ninth Circuit judge from Reagan's Sacramento days. Ed Meese pushed for Douglas Ginsburg, a forty-one year old D.C. Court of Appeals judge and former Harvard Law School faculty member. Fifteen possible nominees had been pared down to Kennedy and Ginsburg; ultimately, President Reagan seemed swayed by Ginsburg's youth, as he was ten years younger than Judge Kennedy.⁸⁶ The thought of Ginsburg sitting on the high Court for forty years appealed to the President, along with his desire to stick the Senate with a candidate it would like no better than Robert Bork.⁸⁷

The nomination of Ginsburg, which was officially announced on October 29th,⁸⁸ started to unravel quickly. Nina Totenberg of National Public Radio and Al Kamen of the *Washington Post* spent several days talking with Ginsburg's friends on the Harvard Law faculty as a step toward developing a profile on the little known nominee. They turned up information that in the 1970s Ginsburg had smoked marijuana with friends.⁸⁹ This might not have been very significant in other settings, but for the Reagan administration, which had raised intolerance of drug use to a public virtue, it proved disabling. Jokes about the "high court" saturated talk shows and dinner conversations. By Friday night, November 6th, even William Bradford Reynolds had had enough. That night, both Reynolds and William J. Bennett, Reagan's Secretary of Education, called Ginsburg to urge him to withdraw. On Saturday, nine days after the nomination was announced, Ginsburg withdrew.⁹⁰

The same morning, Attorney General Ed Meese had an Air Force plane waiting at McClellan Air Base to fly Anthony Kennedy back to Washington, D.C. where he was installed at the Army-Navy Club near the White House and grilled on his personal background. By Monday

85. SCHWARTZ, *supra* note 25, at 140.

86. SAVAGE, *supra* note 5, at 178. In addition to age, Ginsburg's ideological rigidity and his Jewishness were pluses in the decision. Patrick Buchanan "happily dubbed him 'son of Bork.'" SCHWARTZ, *supra* note 25, at 144-45.

87. SCHWARTZ, *supra* note 25, at 144.

88. *Id.* at 145.

89. SAVAGE, *supra* note 5, at 179.

90. *Id.* at 179-80; SCHWARTZ, *supra* note 25, at 145-47.

night, White House aides and the F.B.I. had turned out a completely clean bill of health for Kennedy, with the sole exception that his daughter had an unpaid parking ticket.⁹¹ The nomination was announced on Wednesday, November 11th, passed the relieved Senate Judiciary Committee without any problems or probing questions, and was unanimously confirmed by the Senate on February 3, 1988.⁹² Curiously, the Senate Judiciary Committee reported that Kennedy, a dependable conservative, might have judicial qualities similar to those of Lewis Powell.⁹³ Some questions persisted as to where Justice Anthony M. Kennedy might come down on certain issues; but few observers doubted that the new Justice, although not a rigid ideologue in the image of Robert Bork, represented a solid fifth vote for the Rehnquist Court.⁹⁴ President Reagan's molding of the Court had been completed.

II. ANALYSIS OF SELECTED COURTS OF APPEALS DECISIONS

Evaluating the impact of President Reagan's appointments to the Courts of Appeals on Title VII interpretation and enforcement presented some difficulties. Every Justice votes (and sometimes writes) on almost every Supreme Court case. But on the twenty-eight member Ninth Circuit, for example, virtually all the Title VII cases are decided by three-judge panels that are randomly constituted. Additionally, there are eight senior circuit judges who may also sit on panels and a list of federal district judges in the area served by the Ninth Circuit who may sit when designated by the court administrator.

Notwithstanding these difficulties, this section examines selected decisions from the District of Columbia Court of Appeals, the Seventh Circuit Court of Appeals, and the Ninth Circuit Court of Appeals. The D.C. Circuit was selected because of its historic prominence and because, at the time of analysis, its members were split fairly evenly between Republican and Democratic nominees. The Seventh Circuit was selected because it is the only circuit on which a majority of the acting circuit judges had been appointed by President Reagan. The Ninth Circuit has been selected because it is dominated by President Carter's appointments and had received some publicity due to its reversal rate by the U.S. Supreme Court in the period studied.⁹⁵

91. SAVAGE, *supra* note 5, at 180-81.

92. SCHWARTZ, *supra* note 25, at 148-49.

93. SAVAGE, *supra* note 5, at 182.

94. *Id.*

95. Baker, *supra* note 58, at 28.

I chose for my sample the Title VII cases listed by a Lexis search as decided by the three circuits from January 1, 1985 through July 23, 1985. The search produced eleven cases in the D.C. Circuit, nineteen cases in the Seventh Circuit, and eighteen cases in the Ninth Circuit. These samples were from total populations of 105 cases, 100 cases, and 153 cases respectively. The last six months of the October 1984 Supreme Court Term were selected because they reflect the maximum influence of the Reagan appointees in the first term.

The first step duplicated the evaluation process used for the U.S. Supreme Court and is subject to the same objections. The grids or matrices produced are shown in Table I. Because of the screening out of age discrimination, handicapped, and Reconstruction Era statute cases, the number of cases in each sample has dropped.

TABLE I
DISTRIBUTION OF SAMPLE TITLE VII
CASES FOR COURTS OF APPEALS

<u>D.C. CIRCUIT</u>	<u>Affirm Status Quo</u>	<u>Expand Title VII</u>	<u>Restrict Title VII</u>
Procedural	4	1	0
Substantive	0	3	1
9 Cases Total	4	4	1
<u>7TH CIRCUIT</u>			
Procedural	5	0	2
Substantive	2	3	0
12 Cases Total	7	3	2
<u>9TH CIRCUIT</u>			
Procedural	7	0	0
Substantive	3	3	0
13 Cases Total	10	3	0

A visual analysis of this data did not produce much useful information on the impact of Reagan appointees. A chi-square analysis rearranging the data into another formation and applying a null hypothesis that voting behavior on Title VII cases is independent of appointing power politics was conducted.

I arranged the votes on all Title VII cases in the sample in a 2x3 grid (Table II) separating out the votes of Reagan's appointees from appointees of other presidents. Since the Reagan votes in the Ninth Circuit were so small, I also broke out the votes of President Carter's appointees who numerically dominated the Ninth Circuit. The observed levels of voting behavior do not differ significantly (at the .05 level) from the expected frequencies, and we *cannot* statistically eliminate the *H*₀ (null

TABLE II
DISTRIBUTION OF VOTES ON SAMPLE TITLE VII CASES
BY CIRCUIT WITH CHI-SQUARE VALUES SHOWN

<u>D.C. CIRCUIT</u>	<u>Affirm Status Quo</u>	<u>Expand Title VII</u>	<u>Restrict Title VII</u>
Reagan Appointees	6	2	0
Other	9	14	3
34 Votes	15	16	3
7TH CIRCUIT			
Reagan Appointees	10	3	1
Other	11	6	5
35 Votes	21	9	6
9TH CIRCUIT			
Reagan Appointees	1	0	0
Other	29	9	0
39 Votes	30	9	0
9TH CIRCUIT			
Carter Appointees	17	4	0
Other	13	5	0
39 Votes	30	9	0
$\chi^2 = 4.26$ (D.C. Circuit) $\chi^2 = 2.03$ (7th Circuit) $\chi^2 = 0.307$ (9th Circuit / Reagan) $\chi^2 = 0.417$ (9th Circuit / Carter)			

hypothesis). The critical value of χ^2 at .05 level with two degrees of freedom is 5.99147.

These results should be viewed with some caution due to (1) the subjective nature of the classification; (2) the limited size of the sample; and (3) the low expected values involved. (One rule on sample size is that, ideally, less than 20% of matrix squares should involve values less than 5.0.) In other words, the results of a study of Courts of Appeals decisions over a six-month period at the end of the October 1984 Term show that these judges do not rigidly adhere to the political position of their appointing presidents on matters of employment discrimination. These results are supportive of Professor Tribe's observation that President Reagan's screening process for judicial nominees, as extensive as it was, could not guarantee results for more than a handful of issues and then not consistently once a judge received lifetime tenure.⁹⁶

96. TRIBE, *supra* note 15, at 50-70.

III. U.S. SUPREME COURT DECISIONS

This section reviews all Title VII decisions of the U.S. Supreme Court from the October 1980 Term until the end of the October 1988 Term. Decisions are evaluated and then classified as either: (a) upholding the status quo; (b) restricting application of Title VII; or (c) expanding the application of Title VII. This classification is then used in the next section to help analyze judicial voting patterns. Two reasons can be advanced for those cutoff dates: (1) even though President Reagan was a "lame duck" by the start of the October 1988 Term, shortly after it started, his vice president, George Bush, was elected President and the national agenda hardly shifted at all; (2) even though President Reagan was not elected until one month after the October 1980 Term began and did not take office until the following January, his November election signaled a shift in the national agenda and political environment that most likely influenced Court deliberations during most of the October 1980 Term.

A. October 1980 Term

In *County of Washington v. Gunther*,⁹⁷ a five-member majority of the Court, in an opinion by Justice Brennan, held that the Bennett amendment to Title VII⁹⁸ did not restrict Title VII's prohibition of sex-based wage discrimination to claims under the Equal Pay Act of 1963. Rather, the Court held that a claim for sex-based wage discrimination could also be brought independently under Title VII.⁹⁹ This result marked a significant expansion of Title VII jurisdiction to deal with a wide range of wage discrimination issues that are not covered under the 1963 Act. Justice Rehnquist filed a vigorous dissenting opinion in which the Chief Justice and Justices Potter Stewart and Lewis Powell joined.¹⁰⁰

Earlier in the term, a denial of certiorari provoked dissents from the Chief Justice and Justice Rehnquist in *Proctor & Gamble Manufacturing Co. v. Fisher*.¹⁰¹ Justice Rehnquist argued that the Court should have granted certiorari because the Fifth Circuit Court of Appeals decision encroached on the rule established in *International Brotherhood of*

97. 452 U.S. 161 (1981).

98. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-16, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e-2(h)(1976)).

99. *Gunther*, 452 U.S. at 168.

100. *Id.* at 181 (Rehnquist, J., dissenting).

101. 449 U.S. 1115 (1981).

Teamsters v. United States,¹⁰² which held that an otherwise bona fide seniority system did not lose its protected status under Title VII simply because its operation serves to perpetuate pre-act discrimination.¹⁰³ Specifically, Rehnquist argued that the Fifth Circuit's use of statistical evidence to uphold the district court's invalidation of the challenged seniority system was flawed because it failed to consider the effect of the bona fide seniority system in perpetuating pre-act discrimination against black employees in awarding management jobs.¹⁰⁴ In making this argument, Justice Rehnquist noted that as of January 1, 1977, there were 239 white employees at the plant with more seniority than the most senior black employee.¹⁰⁵ Because I found this argument unpersuasive, this decision was grouped with the status quo decisions.

Previously, in a 5-4 decision, the Court, in an opinion by Justice Powell, had reversed a Third Circuit Court of Appeals ruling on when the applicable statute of limitations began running in a denial of tenure case.¹⁰⁶ *Delaware State College v. Ricks*,¹⁰⁷ which was announced on December 15, 1980, was the first Title VII case handed down by the Court after Ronald Reagan's election to the White House. The district court had ruled that the statute of limitations began to run when the faculty member, Columbus Ricks, a black Liberian, was notified that he would be receiving a terminal contract for the 1974-75 school year and granted a motion to dismiss.¹⁰⁸ As a matter of policy, the Third Circuit had held that the "final date of employment" rule prevailed and that the notice of terminal contract was subject to reversal by its own terms.¹⁰⁹ Using a clearly erroneous standard, the majority of the Court upheld the district court determination and reversed the Third Circuit.¹¹⁰ Justice Potter Stewart dissented in an opinion in which Brennan and Marshall joined,¹¹¹ and Justice Stevens dissented separately.¹¹² Stewart argued that a question of fact existed as to when Ricks had been denied tenure; therefore, a motion to dismiss was wrongly granted.¹¹³ Stevens argued

102. 431 U.S. 324 (1977).

103. *Id.* at 348-55.

104. *Fisher*, 449 U.S. at 1116 (Rehnquist, J., dissenting).

105. *Id.* at 1117.

106. *Delaware State College v. Ricks*, 449 U.S. 250 (1980).

107. *Id.*

108. *Id.* at 254-55.

109. *Id.* at 255-56.

110. *Id.* at 262.

111. *Id.* at 262 (Stewart, J., dissenting).

112. *Id.* at 265 (Stevens, J., dissenting).

113. *Id.* at 265 (Stewart, J., dissenting).

that the actual last date of employment was most appropriate since before then the wrong was subject to change and because it was the date subject to the least dispute.¹¹⁴

Because I was persuaded that the majority had narrowed the window for Title VII claims in academic settings as a matter of law in an area where prior decisions were more liberal, this decision was included with the group that procedurally restricted Title VII. Note that in this pre-Justice O'Connor decision, Eisenhower appointee Potter Stewart voted with the liberal wing of the Court and Justice White's decision to go along with the Rehnquist group threw the outcome into the restrictive category. Thus, White's was the swing vote on a Title VII issue, a pattern that prevailed for the entire first term of the Reagan administration.

In *EEOC v. Associated Dry Goods Corp.*,¹¹⁵ the Court held that Congress did not intend to preclude charging parties from obtaining access to information that the EEOC acquired under its investigative powers before institution of formal proceedings.¹¹⁶ In this case, the employer refused to provide the EEOC with the complainant's employment records and other information relating to its employment practices unless the EEOC agreed not to disclose it to the charging parties. The EEOC refused and issued its subpoena.¹¹⁷ The district court refused to enforce the subpoena without a condition of nondisclosure, and the Fourth Circuit affirmed.¹¹⁸ The Supreme Court reversed and held that a charging employee was entitled to see information in his or her own file, but was a member of the public to whom disclosure was barred as to any other employment file.¹¹⁹ Justice Blackmun concurred in part and dissented in part arguing for a different standard;¹²⁰ Justice Stevens dissented.¹²¹ Justice Powell and Justice Rehnquist took no part in the case.¹²² I was persuaded by the dissents and therefore listed this case as one that expanded the procedural interpretation of Title VII to include limited prelitigation discovery, a matter not previously free of doubt.

Two unanimous decisions in the same term served to affirm the status quo. In *Texas Department of Community Affairs v. Burdine*,¹²³ the Court

114. *Id.* at 265 (Stevens, J., dissenting).

115. 449 U.S. 590 (1981).

116. *Id.* at 598-600.

117. *Id.* at 594.

118. *Id.* at 594-95.

119. *Id.* at 604.

120. *Id.* at 604 (Blackmun, J., concurring in part, dissenting in part).

121. *Id.* at 606 (Stevens, J., dissenting).

122. *Id.* at 604.

123. 450 U.S. 248 (1981).

vacated and remanded a Fifth Circuit decision¹²⁴ on the defendant's burden of proof in a Title VII gender discrimination action following the complainant's establishing a prima facie case.¹²⁵ The 9-0 decision, in an opinion by Justice Powell, held that the defendant only had the burden of clearly explaining the nondiscriminatory reasons for its actions¹²⁶ as the Court had previously ruled in *McDonnell Douglas Corp. v. Green*.¹²⁷ In *Carson v. American Brands, Inc.*,¹²⁸ a united Court held that denial of a joint motion of the parties to enter a consent decree containing injunctive relief in a Title VII class action was an appealable order under the standards announced in *Baltimore Contractors, Inc. v. Bodinger*.¹²⁹

The last Title VII case to be considered this term was *U.S. Postal Service Board of Governors v. Aikens*.¹³⁰ The decision to summarily vacate the judgment provoked a dissent by Justice Marshall arguing that the remand to the Court of Appeals for reconsideration of the plaintiff's burden of proof in a Title VII case, in light of the decision in *Burdine*,¹³¹ was both unnecessary and confusing.¹³² At this stage of the proceeding, a remand did not strike me as doing anything beyond upholding the evidentiary standards expressed in prior cases. Thus, this case shows up in the status quo column.

B. October 1981 Term

In *Kremer v. Chemical Construction Corp.*,¹³³ a five-member majority of the Court held that prior proceedings under the New York State Division of Human Rights provided collateral estoppel for a subsequent EEOC action under Title VII.¹³⁴ Justice Stevens dissented separately.¹³⁵ Justice Blackmun wrote a dissenting opinion which was joined by Justices Brennan and Marshall.¹³⁶ The decision involved some complex questions of res judicata; however, the conclusion seems unavoidable

124. *Burdine v. Texas Dept. of Community Affairs*, 608 F.2d 563 (5th Cir. 1979).

125. *Burdine*, 450 U.S. at 274.

126. *Id.* at 252-60.

127. 411 U.S. 792 (1973).

128. 450 U.S. 79 (1981).

129. 348 U.S. 176 (1955).

130. 453 U.S. 902 (1981).

131. 450 U.S. 248 (1981).

132. *Aikens*, 453 U.S. at 906 (Marshall, J., dissenting).

133. 456 U.S. 461 (1982).

134. *Id.* at 468-69.

135. *Id.* at 508 (Stevens, J., dissenting).

136. *Id.* at 486 (Blackmun, J., dissenting).

that it substantially restricted the jurisdiction of the EEOC and thus the reach of Title VII legislation.

In the same term and with the same 5-4 split, the Court in *American Tobacco Co. v. Patterson*¹³⁷ held that the § 703(h) protection for bona fide seniority systems was not limited to seniority systems adopted before the effective date of Title VII (July 2, 1965), but rather operated to provide some protection to seniority systems adopted after the effective date of the Act.¹³⁸ The concern of the dissent was that the seniority system adopted by *American Tobacco* fell hard on the heels of a long history of segregation and discrimination by race on the part of the employer.¹³⁹ The minority sought to have the more rigorous standards of Title VII race discrimination applied to the seniority system absent the § 703(h) exemption.¹⁴⁰ Thus, the Court held that the post-Title VII seniority system of *American Tobacco* did not violate Title VII.¹⁴¹

In *Sumitomo Shoji America, Inc. v. Avagliano*,¹⁴² a unanimous Court held that a New York corporation that was a wholly owned subsidiary of a Japanese general trading company was subject to Title VII requirements in its employment, notwithstanding language in the friendship, commerce, and navigation treaty between the U.S. and Japan that exempted companies of either nation from employment restrictions in the hiring of specialists and professional employees of its choice. The Court reasoned that a New York corporation was not a corporation of Japan for purposes of the treaty exemption.¹⁴³ Although this case presented a narrow issue, it may become significantly more important in future years and does represent an expansion of the Title VII jurisdiction. My reservations about including it with the cases that substantively expand Title VII were based on the narrow impact of the ruling and not its substance.

In *Connecticut v. Teal*,¹⁴⁴ a five-member majority rejected the "bottom-line" defense of the State of Connecticut, which argued that an employment decision result more favorable to blacks than whites was a sufficient defense to a disparate impact charge based upon a pass-fail examination for supervisor.¹⁴⁵ The majority pointed out that § 703

137. 456 U.S. 63 (1982).

138. *Id.* at 77.

139. *Id.* at 78-79 (Brennan, J., dissenting).

140. *Id.* at 80-84.

141. *Id.* at 76-77.

142. 457 U.S. 176 (1982).

143. *Id.* at 189.

144. 457 U.S. 440 (1982).

145. *Id.* at 451.

(a)(2) of Title VII makes it an unlawful employment practice for an employer to "limit, segregate or classify his employees" in any way which would deprive "any individual of employment opportunities" because of race, color, religion, sex, or national origin.¹⁴⁶ Consequently, the majority held that any stage of the promotion or employment process that was discriminatory subjects the employer to potential Title VII liability even though the final result may not be statistically discriminatory.¹⁴⁷ The *Teal* decision produced a favorable and expansive reading of Title VII nondiscrimination language.

The following week, in *Ford Motor Co. v. EEOC*,¹⁴⁸ a six-member majority of the Court held that an employer charged with Title VII discrimination could toll the accrual of back-pay liability by unconditionally offering the claimant a job previously denied, even though the employer did not offer retroactive seniority to the date of the alleged discrimination.¹⁴⁹ This rather unusual holding provoked a vigorous dissent from Justice Blackmun, who was joined by Justices Brennan and Marshall.¹⁵⁰ Although there was some disagreement about the facts of the case, Justice Blackmun's dissent was persuasive. It characterized the court's decision as "unnecessary and unfair";¹⁵¹ consequently, I characterized this decision as restrictive of Title VII.

*Zipes v. Trans World Airlines, Inc.*¹⁵² involved a Title VII class action brought initially by the flight attendant's union to challenge TWA's policy of grounding all female flight attendants who became mothers while allowing employee fathers to continue to fly. Individual members of the class were substituted for the union which was held an inadequate representative.¹⁵³ Issues of whether filing a timely charge with the EEOC was a jurisdictional prerequisite that could not be waived and whether a retroactive grant of seniority exceeded the Court's authority to remedy Title VII violations were examined.¹⁵⁴ Justice White wrote for the majority holding that filing of a charge with the EEOC was a jurisdictional prerequisite that could be waived or estopped and that a retroactive grant of seniority could be made over the objection of the current

146. *Id.* at 453.

147. *Id.* at 454.

148. 458 U.S. 219 (1983).

149. *Id.* at 232.

150. *Id.* at 241 (Blackmun, J., dissenting).

151. *Id.* at 242.

152. 455 U.S. 385 (1982).

153. *Id.* at 385.

154. *Id.* at 392, 398.

union, rather than the prior union that had brought the action and had been decertified.¹⁵⁵ In a separate opinion in which Chief Justice Burger and Justice Rehnquist joined, Justice Powell concurred in part and concurred in the judgment.¹⁵⁶ Based on the retroactive grant of seniority in a situation where a bona fide seniority system was in place, this decision represented an expansion of Title VII.

Three Title VII actions from this term fell into the status quo column. One involved denial of certiorari over multiple dissents.¹⁵⁷ A second decision, *Pullman-Standard v. Swint*,¹⁵⁸ reversed and remanded a Fifth Circuit decision addressing discrimination under a seniority system challenged under Title VII. Much of the decision involved the proper division of labor between appellate and trial courts, and the Title VII part instructed the courts on remand to apply existing rules of law.¹⁵⁹ Finally, a third decision, *Consolidated Food Corp. v. Unger*,¹⁶⁰ represented a unanimous decision to summarily reverse the Seventh Circuit and allow it to reconsider a conflict between the federal court and the Illinois courts on an issue of gender-based discrimination¹⁶¹ in light of the Court's ruling in *Kremer v. Chemical Construction Corp.*¹⁶²

C. October 1982 Term

In a 7-2 decision on June 20, 1983, the U.S. Supreme Court held that the 1978 Pregnancy Discrimination Act, amending Title VII, prohibited an employer from providing fewer hospitalization benefits for pregnancy-related conditions for the wives of male employees than it provided for its female employees. The decision was *Newport News Ship Building & Dry Dock Co. v. EEOC*.¹⁶³ The majority opinion by Justice Stevens provoked a dissent from Justice Rehnquist in which Justice Powell joined.¹⁶⁴ Justice Rehnquist argued that the Court was not interpret-

155. *Id.* at 397, 399.

156. *Id.* at 401.

157. *Kamberos v. GTE Automatic Elec., Inc.*, 454 U.S. 1060 (1981). Justice White, with whom Brennan and Marshall joined, dissented from the denial of certiorari. The case involved the issue of whether a plaintiff could have her award reduced for the time between the date that she could have requested a "right-to-sue" letter and the date she actually made the request. In White's opinion, a conflict existed between the Circuits on this issue. *Id.* at 1061-62 (White, J., dissenting).

158. 456 U.S. 273 (1982).

159. *Id.* at 286.

160. 456 U.S. 1002 (1982).

161. *Id.* at 1003.

162. 456 U.S. 461 (1982). See *supra* note 132 and accompanying text.

163. 462 U.S. 669 (1983).

164. *Id.* at 685 (Rehnquist, J., dissenting).

ing the Pregnancy Disability Act of 1978, but rather expanding it on its belief that no language in the statute required the protection of spouses of employees from pregnancy discrimination.¹⁶⁵ Interestingly, Justice Rehnquist was the author of the *General Electric Co. v. Gilbert*¹⁶⁶ decision, which had provoked Congress into passing the 1978 legislation. Some hostilities never seem to end.

On July 6, 1983, the Court expanded the operation of Title VII in the area of retirement benefits in *Arizona Governing Committee v. Norris*.¹⁶⁷ The Court held that a state's retirement plan that paid female employees lower monthly retirement benefits than males making the same contributions violated Title VII's proscription against sex-based discrimination.¹⁶⁸ The Court split 5-4 on the issue of retroactivity, with the majority deciding that the *Norris* decision should be prospective only.¹⁶⁹ There are two main opinions in this case. The first by Justice Marshall was joined by Justice O'Connor to produce a majority on the discrimination issue;¹⁷⁰ the second by Justice Powell was joined by Justice O'Connor to produce the prospective application result.¹⁷¹ Viewed in hindsight, this case presaged the coming of a new order in voting patterns on Title VII issues. I viewed the result as an expansive reading of the requirements of Title VII.

In *Crown, Cork & Seal Co., Inc. v. Parker*,¹⁷² Justice Blackmun, for a unanimous Court, ruled that the filing of a class action tolled the statute of limitations for respondent and other members of the putative class.¹⁷³ Therefore, the Court held that since respondent Parker, a black male who had been discharged by the petitioner, did not receive his notice of right to sue until after the class action was filed, he had the full ninety days in which to bring suit after the class action was denied.¹⁷⁴ The district court had granted summary judgment for the former employer on the grounds that Parker had not filed his individual lawsuit until almost two years after receiving his right-to-sue letter.¹⁷⁵ Justice Powell wrote a separate concurring opinion in which Justices Rehnquist and O'Connor

165. *Id.* at 686-89.

166. 429 U.S. 125 (1976).

167. 463 U.S. 1073 (1983).

168. *Id.* at 1086.

169. *Id.* at 1092.

170. *Id.* at 1075-95.

171. *Id.* at 1095-1107 (Powell, J., dissenting in part and concurring in part).

172. 462 U.S. 345 (1983).

173. *Id.* at 348-51.

174. *Id.* at 348.

175. *Parker v. Crown, Cork & Seal Co.*, 514 F. Supp. 122, 124-26 (D. Md. 1981).

joined urging restraint in applying the result.¹⁷⁶ Because this decision resolved a split in the circuits in favor of the more generous time-line interpretation, I listed it among the expansive cases.

Two cases in the October 1982 Term maintained the status quo. *W.R. Grace & Co. v. Local Union 759*¹⁷⁷ involved some complicated issues of arbitration of grievances under a collective bargaining agreement that conflicted with a Title VII consent decree. The arbitrator's award of damages to a discharged employee was found enforceable, and no public policy was violated by the imposition of liability under the collective bargaining agreement because the company could not properly shift the burden of its employment discrimination to the male union members.¹⁷⁸

In *U.S. Postal System Board of Governors v. Aikens*,¹⁷⁹ a unanimous Court vacated and remanded a case in which the D.C. Court of Appeals had reversed a trial court's decision entering judgment for the Postal Service.¹⁸⁰ The case was in the D.C. Circuit for the second time following remand from the high Court to reconsider its first reversal based on *Texas Department of Community Affairs v. Burdine*.¹⁸¹ In short, after the Postal Service put on its evidence in rebuttal to the nonpromoted plaintiff, the district court "must decide which party's explanation of the employer's motivation it believes."¹⁸² This decision seems to merely reiterate what the Court wanted the trier of fact to do initially, which was to apply existing case law.

D. October 1983 Term

The first Title VII case this term involved a denial of certiorari from which Justices Rehnquist and Brennan dissented in an extremely unusual pairing; the decision was *Ashley v. City of Jackson*.¹⁸³ The case considered whether the doctrine of collateral estoppel prevented suit by white policemen alleging Title VII discrimination on the part of the city for hiring or promoting less qualified blacks solely on the basis of their race pursuant to consent decrees entered under prior litigation.¹⁸⁴ These

176. *Parker*, 462 U.S. at 354-55 (Powell, J., concurring).

177. 461 U.S. 757 (1983).

178. *Id.* at 770.

179. 460 U.S. 711 (1983).

180. *Aikens v. U.S. Postal Serv. Bd. of Governors*, 665 F.2d 1057 (D.C. Cir. 1981).

181. 450 U.S. 248 (1981). See *supra* notes 125-31 and accompanying text.

182. *Aikens*, 460 U.S. at 716.

183. 464 U.S. 900 (1983).

184. *Id.* at 900-01.

dissents presage a 5-4 split in *Martin v. Wilks*,¹⁸⁵ wherein Justice Rehnquist mustered the votes to enlarge the possibility of expanded collateral attacks on prior consent decrees by nonparties.¹⁸⁶ At this point, this case preserved the status quo.

Lehman v. Trout,¹⁸⁷ a memorandum opinion announced on February 27, 1984, directed the D.C. Court of Appeals to remand a Title VII case which had been pending since 1973 for new findings of fact in light of *Pullman*¹⁸⁸ and *Aikens*.¹⁸⁹ Justice Stevens, joined by Brennan and Marshall, dissented from this action involving four female Navy employees who alleged discrimination in hiring and promotion on the part of the U.S. Navy.¹⁹⁰ The gist of the dissent was that the lower courts had adequately considered the points on which the high Court was basing remand and that protracted litigation needed to be concluded, not "casually" commanded to begin anew.¹⁹¹ On balance, the Title VII aspect of this action seemed to reinforce the status quo.

Procedural application of Title VII was expanded by a 5-4 split in *EEOC v. Shell Oil Co.*¹⁹² The majority opinion, written by Justice Marshall, held that notice and charge of pattern and practice discrimination levied by EEOC met statutory requirements of specificity because it identified blacks and women as victims of employer's putative discriminatory practices; specified six occupational categories to which blacks had been denied equal access and seven categories to which women had been denied equal access; and alleged that the employer engaged in discrimination in recruitment, hiring, selection, job assignment, training, testing, promotion, and terms and conditions of employment.¹⁹³ Justice O'Connor concurred in part and dissented in part in an opinion joined by Chief Justice Burger, and Justices Powell and Rehnquist. Primarily, the dissent concerned whether the notice of the subpoena to Shell satisfied the statute and whether, if it was inadequate, such inadequacy of notice would require quashing the EEOC's subpoena.¹⁹⁴ Based on the dissent, I categorized this case as expanding enforcement of Title VII procedurally.

185. 490 U.S. 755 (1989). See *infra* text accompanying notes 296-301.

186. *Id.* at 768-69.

187. 465 U.S. 1056 (1984).

188. 456 U.S. 273 (1982).

189. 460 U.S. 711 (1983).

190. *Trout*, 465 U.S. at 1056-62 (Stevens, J., dissenting).

191. *Id.* at 1060-62 (Stevens, J., dissenting).

192. 466 U.S. 54 (1984).

193. *Id.* at 57-61.

194. *Id.* at 82-83 (O'Connor, J., dissenting in part).

On June 4, 1984, the Court announced its decision in *Baldwin County Welcome Center v. Brown*.¹⁹⁵ It seems at first reading that the case, in so far as the majority is concerned, represents an affirmation of the status quo by strict interpretation of the ninety-day statute of limitations for filing suit under a right-to-sue letter issued by the EEOC.¹⁹⁶ However, a reading of Justice Stevens's dissent suggests that more was at stake. The dissent implied that the decision actually narrowed the ninety-day filing requirement for indigents attempting to obtain appointment of counsel by the court and filing in forma pauperis.¹⁹⁷ Apparently, plaintiff Brown had sent a letter detailing the basis for her complaint, an affidavit of indigency, and a request for an appointment of attorney to the court, to which she had attached her right-to-sue letter from the EEOC. She sent that letter to the court in Montgomery as she was advised to do by the EEOC. When the matter was transferred to another court, the appointment of an attorney and the filing of a formal complaint did not occur until the ninety-sixth day after the issuance of the right-to-sue letter.¹⁹⁸ The majority opinion ignored the handwritten letter of Ms. Brown and treated the filing of the complaint, which was entitled "Amended Complaint," as though it was the original filing.¹⁹⁹ On these facts, the majority is doing nothing original; under the facts produced in the opinion by Justice Stevens, we have a substantial restriction of access to Title VII relief for indigent plaintiffs. I resolved this conflict by treating this case as involving affirmation of the status quo on the ninety-day issue and also procedurally restricting access to the courts for persons filing in forma pauperis.

*Hishon v. King & Spalding*²⁰⁰ was a unanimous ruling of the Court that Title VII consideration should apply to partnership status where employment by a partnership is involved.²⁰¹ It represents an expansion of Title VII into an area thought by many to be immune from the reach of Title VII on the grounds of freedom of association and that the movement from employee to partner represents a transition from employee to employer. Those arguments, although considered by the Court, were dismissed.²⁰²

195. 466 U.S. 147 (1984).

196. *Id.* at 152.

197. *Id.* at 154 (Stevens, J., dissenting).

198. *Id.* at 157 (Stevens, J., dissenting).

199. *Id.* at 148.

200. 467 U.S. 69 (1984).

201. *Id.* at 75-76.

202. *Id.* at 77-78.

An important 1984 case, if importance can be judged from media attention, was *Firefighters Local Union No. 1784 v. Stotts*.²⁰³ This case involved a dispute over the implementation of layoffs among Memphis Fire Department personnel following a consent decree that mandated certain minimum quotas for black hiring.²⁰⁴ The district court modified the consent decrees, which originally did not address the question of layoffs, and enjoined layoffs by seniority and demotions of minority firemen so as to maintain current percentages. The Sixth Circuit affirmed.²⁰⁵ The U.S. Supreme Court held that a district court order could not be justified as a proper modification of the consent decree; layoffs by seniority were appropriate, notwithstanding the affirmative action program that had been mandated for the Memphis Fire Department.²⁰⁶ Justice O'Connor wrote a separate opinion concurring with the majority opinion by Justice White;²⁰⁷ Justice Stevens filed an opinion concurring in the result that characterized the White opinion on Title VII issues as "wholly advisory."²⁰⁸ Justice Blackmun, joined by Justices Brennan and Marshall, dissented.²⁰⁹ The *Stotts* decision, in so far as it upheld seniority against an affirmative action challenge in time of layoffs, reaffirmed a line of cases going back to *Teamsters v. United States*.²¹⁰ However, the tone, as well as some of the language of the White opinion, which gave some comfort to the parties alleging that affirmative action was reverse discrimination, were sufficient to qualify that case as restrictive of Title VII. This is particularly true in view of the strong interpretation of the case given by Attorney General Ed Meese and Assistant Attorney General William Bradford Reynolds and the encouragement that the Reagan Justice Department took from White's language. This case, then, merited two marks in Table V.

Cooper v. Federal Reserve Bank of Richmond,²¹¹ announced on June 25, 1984, involved procedural issues related to Title VII. For a unanimous Court, Justice Stevens held that the judgment in a class action establishing that an employer did not engage in a general pattern and practice of discrimination against a certified class of employees did not preclude individual class members from maintaining subsequent civil ac-

203. 467 U.S. 561 (1984).

204. *Id.* at 564-65.

205. *Id.* at 566-68.

206. *Id.* at 573.

207. *Id.* at 583 (O'Connor, J., concurring).

208. *Id.* at 590 (Stevens, J., concurring).

209. *Id.* at 593 (Blackmun, J., dissenting).

210. 431 U.S. 324 (1977).

211. 467 U.S. 867 (1984).

tions for racial discrimination against their employer.²¹² Justice Powell did not participate and Justice Marshall concurred in the result.²¹³ I saw this decision as establishing a procedural expansion for Title VII enforcement.

E. October 1985 Term

*Wygant v. Jackson Board of Education*²¹⁴ came down on May 19, 1986. Nonminority teachers sued the Jackson Board of Education alleging that application of a provision in their collective bargaining agreement that insulated some minority teachers against layoffs by seniority violated their Fourteenth Amendment Equal Protection rights.²¹⁵ The challenged provision was adopted by the Jackson Board of Education in 1972 because of racial tension in the community.²¹⁶ After litigation in both federal and state courts, the Board had adhered to the challenged provision and, as a direct result, in the 1976-77 and 1981-82 school years nonminority teachers had been laid off, while minority teachers with less seniority were retained to maintain racial balance.²¹⁷

The displaced nonminority teachers brought suit in federal district court alleging violations of the Equal Protection Clause, Title VII, 42 U.S.C. § 1983, and other statutes.²¹⁸ On cross motions for summary judgment, the district court dismissed all of the teachers' claims.²¹⁹ A three-judge panel of the court of appeals, relying on the district court's opinion, affirmed.²²⁰ In summary, these courts held that racial preferences granted by the board need not be grounded in a finding of prior discrimination, but such preferences were permissible under the Equal Protection Clause if they were an attempt to remedy societal discrimination by providing proper role models for minority children.²²¹

In a cluster of opinions, a bare majority of the Supreme Court reversed. Four Justices argued that the Equal Protection Clause precluded preferential protection from layoff by seniority based on race in the absence of any determination of prior illegal discrimination.²²² Exactly

212. *Id.* at 878.

213. *Id.* at 882 (Marshall, J., concurring).

214. 476 U.S. 267 (1986).

215. *Id.* at 271.

216. *Id.* at 270.

217. *Id.* at 271-72.

218. *Id.* at 272.

219. *Wygant v. Jackson Bd. of Educ.*, 546 F. Supp. 1195, 1200-04 (E.D. Mich. 1982).

220. *Wygant v. Jackson Bd. of Educ.*, Jackson, Mich., 746 F.2d 1152, 1159 (6th Cir. 1984).

221. *Wygant*, 476 U.S. at 272.

222. *Id.* at 284.

what the Court held may be subject to some debate as Justice Powell wrote a mere plurality opinion in which Chief Justice Burger and Justice Rehnquist concurred. Justice O'Connor concurred in part of Powell's opinion and the judgment, but not in the wording of the appropriate test.²²³ Justice White concurred in the judgment, raising issues about racially discriminatory layoffs in the absence of identified discriminatees.²²⁴ Justice Marshall wrote a vigorous dissenting opinion in which Justices Brennan and Blackmun joined.²²⁵ Marshall saw the posture of the case and the issue presented very differently from Powell:

The sole question posed by this case is whether the Constitution prohibits a union and a local school board from developing a collective-bargaining agreement that apportions layoffs between two racially determined groups as a means of preserving the effects of an affirmative hiring policy, the constitutionality of which is unchallenged.²²⁶

Justice Stevens dissented separately in an opinion that argued for a direct determination of whether the board's action advances the public interest in educating children for the future, and whether that public interest justifies the adverse affects imposed upon a disadvantaged group.²²⁷

I encountered serious doubts about evaluating the case. On one hand, it seemed to uphold a long line of cases holding that layoffs by reverse seniority did not violate Title VII. On the other hand, it seemed to impose a new Equal Protection limitation on the ability of parties to a collective bargaining agreement to protect an affirmative action plan (potentially required by Title VII) against dismantling in periods of declining employment. I ultimately decided that *Wygant* represented a significant restriction on Title VII interpretation and enforcement, even though the decision could have been dismissed as not dealing directly with Title VII issues. The savaging of progress toward full representation of women and minorities in the workforce by layoffs during downturns has been well documented;²²⁸ the distinction between making hiring progress and protecting such progress seems too artificial to support radically different approaches by the Court.

223. *Id.* at 284-94 (O'Connor, J., concurring).

224. *Id.* at 294-95 (White, J., concurring).

225. *Id.* at 295-312 (Marshall, J., dissenting).

226. *Id.* at 300 (Marshall, J., dissenting).

227. *Id.* at 313 (Stevens, J., dissenting).

228. William A. Wines, *Seniority, Recession, and Affirmative Action: The Challenge for Collective Bargaining*, 20 AM. BUS. L.J. 37 (1982).

*Meritor Savings Bank v. Vinson*²²⁹ was announced exactly one month after *Wygant*. A woman employee brought a Title VII action against her supervisor and her employer, a bank. The district court entered judgment after an eleven-day bench trial for both defendants. The court of appeals reversed and remanded.²³⁰ A unanimous Supreme Court, in an opinion by Justice Rehnquist, sustained the reversal and held that the correct inquiry on issues of sexual harassment was whether sexual advances were unwelcome, not whether an employee's participation in them was voluntary.²³¹ Further, the Court held that a sexual harassment claim could lie even in the absence of any economic impact on the plaintiff. The existence of a policy against sexual harassment and a grievance procedure did not insulate the bank from liability where procedure required the plaintiff to report harassment actions to her supervisor, who was the one engaging in the harassment.²³²

Justice Marshall concurred in the judgment in a separate opinion in which Justices Brennan, Blackmun, and Stevens joined. The main point of Marshall's opinion was to argue for adoption of the EEOC guidelines imposing liability on the employer for acts of sexual harassment committed by supervisors regardless of whether the employer knew or should have known of their occurrence.²³³ I rated this decision as a substantive expansion of Title VII, since it recognized hostile-environment type actions and moved past the voluntariness standard to the issue of unwelcome advances regardless of ultimate consent.

*Bazemore v. Friday*²³⁴ was announced on July 1, 1986. Suit was initiated by black employees and the United States alleging a pattern and practice of racial discrimination in employment and provision of services by the North Carolina Agricultural Extension Service.²³⁵ The district court declined to certify a class, entered judgment for defendants in all respects, and ruled against individual claimants on all discrimination claims. On appeal, the lower court was affirmed.²³⁶ The Supreme Court affirmed in part, reversed in part, and remanded. A unanimous Court held that the court of appeals erred in holding that the defendant had no

229. 477 U.S. 57 (1986).

230. *Vinson v. Taylor*, 753 F.2d 141, 152 (D.C. Cir. 1985).

231. *Vinson*, 477 U.S. at 68.

232. *Id.* at 67-73.

233. *Id.* at 74-78 (Marshall, J., concurring). The majority of the Court refrained from passing on the standard for imposing liability on the employer bank, merely rejecting the extreme positions of no liability absent actual knowledge and of strict liability. *Id.* at 72.

234. 478 U.S. 385 (1986).

235. *Id.* at 388-89.

236. *Bazemore v. Friday*, 151 F.2d 662 (4th Cir. 1984).

duty to eradicate salary disparities that had their origins before the effective date of Title VII, that failure of regression analyses to include all variables affected probity of analyses but not admissibility, and that the trial court erred in excluding evidence showing that past salary equalization efforts of the defendant were insufficient.²³⁷ By a 5-4 margin, the Court, for reasons stated by Justice White, held that the Extension Service was not required to do anything more than disband segregated 4-H and Homemaker Clubs and establish racially neutral membership standards in order to correct prior discrimination.²³⁸ Based on evidentiary holdings, I rated this decision as a procedural expansion of Title VII.

F. October 1986 Term

Ansonia Board of Education v. Philbrook,²³⁹ announced on November 17, 1986, started when a teacher filed suit alleging that the employing school board's policy of only allowing use of three days of paid leave for religious observance and not allowing three days of paid leave for personal business for religious observance violated Title VII.²⁴⁰ The majority restricted Title VII by finding that the school district was not in violation; they held that the employer made a reasonable accommodation of religious practices, satisfying Title VII. The case was ordered back to district court for further fact finding.²⁴¹

The actual split of the Court can be described as 1-7-1. Justice Marshall filed a dissenting opinion arguing that the employer had the burden of proving everything possible had been done to accommodate an employee's religious needs.²⁴² On the other hand, Justice Stevens's dissent argued the decision was not narrow enough. He thought the Court should have simply reversed the judgment, not sent it back for further proceeding.²⁴³

In *California Federal Savings & Loan Ass'n v. Guerra*,²⁴⁴ a plurality held that the California state statute that required employers to provide leave and reinstatement to workers disabled by pregnancy was not preempted by Title VII, as amended by the Pregnancy Discrimination Act,

237. *Bazemore*, 478 U.S. at 386-87.

238. *Id.* at 387-88.

239. 479 U.S. 60 (1986).

240. *Id.* at 63.

241. *Id.* at 68-71.

242. *Id.* at 72-75 (Marshall, J., dissenting).

243. *Id.* at 75-83 (Stevens, J., dissenting in part).

244. 479 U.S. 272 (1987).

because it was not inconsistent with the purpose of the federal statute.²⁴⁵ (The 6-3 split disregards section III-A, which is a procedural issue.) This outcome reaffirmed the status quo of Title VII legislation. Justice White, wanting to narrow the issue, filed a dissenting opinion and was joined by Justices Powell and Rehnquist.²⁴⁶ They argued that Title VII prohibited preferential treatment of pregnant workers and that the majority was purporting to authorize employers to commit an unfair employment practice outlawed by Title VII. The basis of the dissent's position was that the California law did not require employers to provide equivalent benefits for disabilities of other workers, and, consequently, discriminated in favor of women in violation of Title VII's prohibition of preferential treatment.²⁴⁷

The *United States v. Paradise*²⁴⁸ decision addressed a consent order imposing a one-for-one promotion policy on the Alabama Department of Public Safety, which required that one qualified black state trooper be promoted to corporal for every white trooper promoted. The five-justice majority held that race-conscious relief in this case did not violate the Equal Protection Clause of the Fourteenth Amendment because it was narrowly drawn to promote a compelling governmental interest.²⁴⁹ The majority ruling expanded the reading of Title VII by protecting race-conscious remedies from allegations of reverse discrimination. Justices White and O'Connor both wrote dissenting opinions; Justice O'Connor's opinion was joined by Justice Scalia and Chief Justice Rehnquist.²⁵⁰

A 6-3 split of the Supreme Court resulted in an expansion of Title VII in *Johnson v. Transportation Agency, Santa Clara County, California*.²⁵¹ Justice Brennan's majority opinion held that consideration of an employee's gender for hiring and promotion did not violate Title VII as long as the approach brought a gradual, remedial improvement in the representation of minorities and women in the work force; the majority considered such a plan to be consistent with Title VII.²⁵² Justice White

245. *Id.* at 288.

246. *Id.* at 297 (White, J., dissenting).

247. *Id.*

248. 480 U.S. 149 (1987). For a decidedly critical analysis of this decision, see Lino A. Graglia, *The "Remedy" Rationale for Requiring or Permitting Otherwise Prohibited Discrimination: How the Court Overcame the Constitution and the 1964 Civil Rights Act*, 22 SUFFOLK U. L. REV. 569, 596-618 (1989).

249. *Paradise*, 480 U.S. at 166-70.

250. *Id.* at 196 (O'Connor, J., dissenting).

251. 480 U.S. 616 (1987).

252. *Id.* at 640-42.

wrote a dissenting opinion.²⁵³ Justice Scalia wrote a separate dissenting opinion joined by Justice Rehnquist.²⁵⁴

*Goodman v. Lukens Steel Co.*²⁵⁵ raised two independent points of argument. The first related to a civil rights issue beyond the scope of this Article. The Title VII issue in this case involved unions' liability in employee representation. The majority opinion by Justice White held that the union's rejection of disparate treatment grievances presented by blacks, solely because claims that alleged racial bias were "troublesome" to process, violated Title VII.²⁵⁶ This holding expanded Title VII. Justice Powell, who was joined by Justice Scalia, dissented.²⁵⁷

A unanimous Court reaffirmed the status quo in *Corporation of the Presiding Bishop of The Church of Latter-Day Saints v. Amos*.²⁵⁸ The Court upheld the exemption of secular, nonprofit activities of religious employers from the Title VII religious discrimination provisions.²⁵⁹ The case originated when various employees were discharged from secular employment by non-profit church related organizations because they lost their "temple recommends," which indicated good standing in the church by behavior such as tithing and abstaining from alcohol and tobacco.²⁶⁰ The former employees brought a class action alleging that the 1972 amendments to section 702 were an unconstitutional violation of the Establishment Clause. Summary judgment for plaintiffs was entered by the district court.²⁶¹ The Supreme Court, Justice White writing the opinion, reversed.²⁶² Although the 1972 amendments greatly expanded the exemptions from Title VII, thereby restricting the reach of the act, that restriction was accomplished by Congress; I consequently classed this decision as upholding the status quo since the Court did not itself promote any restriction of the law.

253. *Id.* at 657 (White, J., dissenting).

254. *Id.* at 657 (Scalia, J., dissenting).

255. 482 U.S. 656 (1987).

256. *Id.* at 669.

257. *Id.* at 680 (Powell, J., dissenting).

258. 483 U.S. 327 (1987).

259. *Id.* at 343.

260. *Id.* at 330-31.

261. *Amos v. Corp. of Presiding Bishop*, 594 F. Supp. 791, 831 (D. Utah 1984); *Amos v. Corp. of Presiding Bishop of Church*, 618 F. Supp. 1013, 1030 (D. Utah 1985).

262. *Amos*, 483 U.S. at 330.

G. October 1987 Term

Justice White filed a dissenting opinion from denial of certiorari in *McQuillen v. Wisconsin Education Ass'n Council*.²⁶³ The petition for certiorari asked the Court to resolve a split in the circuits on a plaintiff's Title VII standard of proof. The Seventh Circuit required a plaintiff to establish that an employer's discriminatory intent was the "but for" cause of the adverse employment decision, but the Eighth Circuit only required a plaintiff to establish that discriminatory motive was a determining factor in such a job decision.²⁶⁴ Justice White strongly felt that the Court should decide the issue of causation once and for all. Apparently, the other eight justices were not yet ready to tackle that issue. The *McQuillen* case reaffirmed the status quo. In hindsight, this dissent may have foreshadowed the Court's opinions in *Watson v. Fort Worth Bank & Trust*²⁶⁵ and *Wards Cove Packing Co. v. Atonio*.²⁶⁶

In a 5-3 split of the Court, the decision in *EEOC v. Commercial Office Products Co.*²⁶⁷ reaffirmed the status quo on the time lines for filing a Title VII complaint. A plurality opinion by Justice Marshall held that a state's decision to waive the sixty-day period pursuant to a work-sharing agreement with the EEOC terminated the agency's proceedings so the EEOC could immediately process the charges; a complainant, who filed timely under the state law, was entitled to the 300-day extended filing period of Title VII.²⁶⁸ Justice O'Connor concurred in part and in the judgment;²⁶⁹ Justices Stevens, Rehnquist and Scalia dissented.²⁷⁰ Anthony Kennedy did not participate.²⁷¹

A narrow ruling, which only applied to the United States Postal Service, resulted from *Loeffler v. Frank*.²⁷² A five-Justice majority held that prejudgment interest could be awarded in suits against the U.S. Postal Service brought under Title VII and that sovereign immunity was not available as a defense to the claim.²⁷³ Justice Blackmun wrote for the majority; Justice White filed a dissenting opinion in which Rehnquist and

263. 487 U.S. 1211 (1988).

264. *Id.* at 1224 (White, J., dissenting).

265. 487 U.S. 977 (1988). *See infra* part IV.

266. 490 U.S. 642 (1989). *See infra* part IV.

267. 486 U.S. 107 (1988).

268. *Id.* at 115, 125.

269. *Id.* at 125 (O'Connor, J., concurring).

270. *Id.* at 126 (Stevens, J., dissenting).

271. *Id.* at 125.

272. 486 U.S. 549 (1988).

273. *Id.* at 565.

O'Connor joined.²⁷⁴ This ruling neither expanded nor restricted Title VII.

In *Florida v. Long*,²⁷⁵ two independent Title VII issues were examined. Because of the distinct differences between the topics, this case was treated as two separate cases. The first issue was procedural and established the effective date for gender-based discrimination in pension funds.²⁷⁶ An 8-1 Court, with only Justice Stevens dissenting, affirmed the status quo in concluding that the Florida optional retirement plan did violate Title VII legislation.²⁷⁷ The second part of the case resulted in a restriction of Title VII. The five-justice majority, led by Justice Kennedy, held that employees who retired before the effective date of *Norris*²⁷⁸ were not entitled to a re-adjusted benefits payment structure.²⁷⁹ Justice Stevens dissented,²⁸⁰ as did Justices Blackmun, Marshall, and Brennan.²⁸¹

A black woman brought suit against her employer alleging racial discrimination in *Watson v. Fort Worth Bank & Trust*.²⁸² The case was treated as two separate Title VII cases for purposes of this analysis. First, Justice O'Connor led a unanimous eight-member Court (without participation of Justice Kennedy) to an expansion of Title VII. The court held that disparate impact analysis may be properly applied to a subjective or discretionary promotion system, as opposed to using a disparate treatment model.²⁸³

A 4-4 split restricting Title VII occurred in the second part of the case, which addressed the correct standards for the plaintiff's burden of proof. Justices O'Connor, Rehnquist, Scalia, and Stevens held that the initial burden of proof was carried when the plaintiff established numerically that facially neutral hiring practices generated discriminatory patterns, but the ultimate burden of proof still remained with the plaintiff.²⁸⁴ The dissent believed that the plurality was blurring the distinction between disparate impact and disparate treatment forms of dis-

274. *Id.* at 566 (White, J., dissenting).

275. 487 U.S. 223 (1988).

276. *Id.* at 237-38.

277. *Id.* at 235.

278. *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983).

279. *Long*, 487 U.S. at 240.

280. *Id.* at 247 (Stevens, J., dissenting).

281. *Id.* at 240 (Blackmun, J., dissenting).

282. 487 U.S. 977 (1988).

283. *Id.* at 990-91.

284. *Id.* at 994-97.

crimination.²⁸⁵ The implications of this case are discussed at length in Section VI.

H. October 1988 Term

In the sex-discrimination case of *Price Waterhouse v. Hopkins*,²⁸⁶ a female associate was refused admission as a partner in a public accounting firm.²⁸⁷ A six-justice majority, led by Justice Brennan, expanded Title VII by holding that when a plaintiff in a Title VII case proved that her gender played a part in the employment decision, the defendant could avoid a finding of liability by proving by a preponderance of the evidence that it would have reached the same employment decision without such impermissible considerations of gender.²⁸⁸ Dissenting Justices Kennedy, Rehnquist, and Scalia argued that the final burden of proof belonged to the plaintiff, not the defendant partnership.²⁸⁹

Even though statistical evidence demonstrated a high percentage of nonwhite workers in unskilled positions and a low percentage of such workers in skilled positions in *Wards Cove Packing Co. v. Atonio*,²⁹⁰ it failed to establish a disparate impact case. The majority held that the composition of the relevant labor market must be examined and ratified Justice O'Connor's plurality opinion in *Watson v. Fort Worth Bank & Trust* from the previous term.²⁹¹ Dissenting Justice Stevens, who was joined by Justices Brennan, Marshall and Blackmun, argued that "intent" should play no role in a disparate impact inquiry and that the majority was reducing the burden of proof for employers, making it harder for employees to prove cases.²⁹² This case is discussed at length in Section VI.

By a 5-3 split in *Lorance v. AT&T*,²⁹³ the majority held that proof of disparate impact was not sufficient to invalidate a seniority system; an actual "intent to discriminate" must be proved.²⁹⁴ Justice Stevens wrote a separate opinion concurring in the judgment on the basis of prior decisions.²⁹⁵ Justices Brennan and Blackmun joined Justice Marshall's dis-

285. *Id.* at 1001-02 (Blackmun, J., concurring).

286. 490 U.S. 228 (1989).

287. *Id.* at 231-32.

288. *Id.* at 237-38.

289. *Id.* at 286-87 (Kennedy, J., dissenting).

290. 490 U.S. 642 (1989).

291. *Id.* at 656-57.

292. *Id.* at 670-71 (Stevens, J., dissenting).

293. 490 U.S. 900 (1989).

294. *Id.* at 911-12.

295. *Id.* at 913 (Stevens, J., concurring).

senting opinion. The dissent argued strongly that the majority opinion rewarded those employers ingenious enough to cloak their acts of discrimination in a facially neutral guise, although the effects may be discriminatory.²⁹⁶ This case produced a restrictive reading of Title VII.

The high Court split 5-4 on a so-called reverse-discrimination decision announced the same day as *Lorance*, June 12, 1989. In *Martin v. Wilks*,²⁹⁷ a majority opinion by Chief Justice Rehnquist held that white firefighters, who had failed to intervene in an earlier employment discrimination proceeding in which consent decrees established hiring and promotion goals for black fire fighters, were not estopped to subsequently challenge employment decisions taken by Alabama municipalities pursuant to those consent decrees.²⁹⁸ The district court had dismissed the action as an "impermissible collateral attack," but the court of appeals reversed that dismissal.²⁹⁹ Rehnquist, citing a 1940 decision, held that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process."³⁰⁰ Justice Stevens entered a vigorous dissenting opinion, joined by Brennan, Marshall, and Blackmun, which stated, in part, that:

[I]n a case such as these, however, in which there has been no showing that the decree was collusive, fraudulent, transparently invalid, or entered without jurisdiction, it would be "unconscionable" to conclude that obedience to an order remedying a Title VII violation could subject a defendant to additional liability.³⁰¹

Further, Stevens concluded that:

There is nothing unusual about the fact that litigation between adverse parties may, as a practical matter, seriously impair the interests of third persons who elect to sit on the sidelines. Indeed, in complex litigation this Court has squarely held that a sideline-sitter may be bound as firmly as an actual party if he had adequate notice and a fair opportunity to intervene and if the judicial interest in finality is sufficiently strong.

There is no need, however, to go that far in order to agree with the District Court's eminently sensible view that compliance with the terms of a valid decree remedying violations of Title VII

296. *Id.* at 917 (Marshall, J., dissenting).

297. 490 U.S. 755 (1989).

298. *Id.* at 767-68.

299. *In re Birmingham Reverse Discrimination Employment Litig.*, 833 F.2d 1492, 1498 (11th Cir. 1987).

300. *Wilks*, 490 U.S. at 761 (citing *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)).

301. *Id.* at 790 (Stevens, J., dissenting).

cannot itself violate that statute or the Equal Protection Clause.³⁰²

The majority opinion restricted the application and enforcement of Title VII by opening up consent decrees to extensive collateral attack.

A 6-2 decision in *Independent Federation of Flight Attendants v. Zipes*³⁰³ restricted application of Title VII. The Court's opinion, written by Justice Scalia, held that district courts may award attorney's fees against those who are not charged with Title VII violations, but only if the third party's action is found to be "frivolous, unreasonable, or without foundation."³⁰⁴ Essentially, this rule insulates most intervenors from the possibility of having fees imposed upon them. The decision resulted in a dissent by Justice Marshall, who was joined by Justice Brennan. Marshall argued that defendants could now rely on intervenors to raise many of their defenses, thereby minimizing the fee exposure of defendants and forcing the plaintiffs to litigate most of their claims against parties from whom they have no chance of recovering fees.³⁰⁵

IV. AN ANALYSIS OF VOTING PATTERNS ON THE HIGH COURT

A. *Voting Patterns - 1981-85*

1. Method of Analysis

A Lexis search limited to U.S. Supreme Court cases from 1979 to July 1985, using the search term "Title VII and employ! with/discriminate!" generated sixty-seven cases. Of these sixty-seven cases, analysis revealed that there were twenty-six relevant full-opinion Title VII cases and six Title VII cases involving a denial of certiorari in which one or more of the justices filed an opinion. In all, there were thirty-two relevant cases with opinions.

For preliminary analysis, a spread sheet was generated on which the Court's action was characterized as either expanding Title VII, restricting Title VII, or affirming the status quo. Two of the cases generated entries in more than one column. In the *Stotts*³⁰⁶ case, I believe that the seniority override of the consent decree was an affirmation of the status quo; however, the tone of the opinion by Justice White contained some "reverse discrimination" language and substantial sympathy for the arguments of "innocent victims," by which he meant more senior employ-

302. *Id.* at 792 (citations omitted).

303. 491 U.S. 754 (1989).

304. *Id.* at 766.

305. *Id.* at 770-80 (Marshall, J., dissenting).

306. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984).

ees who had not participated in discriminatory employment decisions, thereby engendering a mark in the column for restrictive Title VII applications. In the *Baldwin County Welcome Center v. Brown*³⁰⁷ case, the per curiam decision, which provoked a dissent by Justice Stevens, merited a mark in the column for restricting Title VII because the Court very narrowly read the ninety-day jurisdictional filing requirement in the context of the in forma pauperis petition; at the same time, a less critical reading of the case suggested that it, in part, affirmed the status quo of a strict adherence to the ninety-day requirement in EEOC cases. All other cases generated only single entries.

Totalling the characterizations for the relevant Title VII cases since the November 1980 elections produced a profile of eleven marks for an expanded interpretation and enforcement of Title VII, six marks for a restricted reading of Title VII, and seventeen marks for an affirmation of the status quo. Of the eleven cases that expanded Title VII interpretation and enforcement, it should be emphasized that five of these cases involved procedural, jurisdictional, or other technical matters, not the substance of Title VII as such. Deleting these procedural and technical expansions of Title VII left just six cases in five years in which the Court expanded the federal law for eliminating employment discrimination. Of the six cases that restricted Title VII application, one of the cases involved procedural restrictions; thus, the Court gave us five decisions which involved a substantive restriction of Title VII. The results seem to be evenly balanced. However, the amount of division within the Court on the subject of Title VII issues was remarkable.

This Article will now examine how the Justices voted on the six cases that expanded the application of Title VII and on the five cases that provided a restrictive reading of Title VII (see Tables III and IV). For purposes of this Article, three of the six expansive cases involved unanimous votes. Therefore, the most conservative or restrictive posture on these six cases would be three votes with the majority and three votes in dissent. Justice Rehnquist and Justice Powell achieved that particular status. The Chief Justice and Justice O'Connor were only slightly less conservative. Retired Justice Potter Stewart came to bat once and concurred in a dissenting opinion. The balance of the five justices all voted six to nothing with the majority on the six cases that expanded Title VII; they were Justices Brennan, White, Marshall, Blackmun, and Stevens.

Since the October 1980 Term, five cases had been decided that restricted the application or interpretation of Title VII. On those five

307. 466 U.S. 147 (1984).

TABLE III
ANALYSIS OF INDIVIDUAL VOTES ON
SIX EXPANSIVE CASES*

	<u>VOTE WITH MAJORITY</u>	<u>DISSENT</u>
Burger	4	2
Brennan	6	0
White	6	0
Marshall	6	0
Rehnquist	3	3
Blackmun	6	0
Powell	3	3
Stevens	6	0
O'Connor	4	1
Stewart	0	1

*On the *Arizona Governmental Committee* case, the Court's vote on retroactivity is ignored; the result is that three of the cases that expanded Title VII interpretation are treated in this table as unanimous.

TABLE IV
ANALYSIS OF INDIVIDUAL VOTES ON
FIVE RESTRICTED CASES

	<u>VOTE WITH MAJORITY</u>	<u>DISSENT</u>
Burger	5	0
Brennan	0	5
White	5	0
Marshall	0	5
Rehnquist	5	0
Blackmun	1	4
Powell	5	0
Stevens	2	3
O'Connor	5	0

cases, five of the Justices had a perfect voting record, voting with the majority on all five cases; they were the Chief Justice, Justices White, Rehnquist, Powell, and O'Connor. Justice Stevens voted twice with the majority to restrict Title VII and dissented in three cases. Justice Blackmun voted only once with the majority to restrict Title VII and dissented in the other four cases. Justices Brennan and Marshall had matching records of dissenting in all five cases.

The above analysis of individual voting habits suggests that the Court as of July 1985 could be arranged into two voting blocks with a single swing vote deciding the substantive cases in the Title VII area from Oc-

tober 1980 until July 1985. Justices Brennan, Marshall, Stevens, and Blackmun represented the active or expansionist forces for Title VII on the Court. Justice Blackmun is only slightly more cautious than Brennan and Marshall; Justice Stevens is only slightly more cautious than Blackmun. On the other side, four voices on the Court urged either a restrictive or nonexpansive reading of Title VII; they were Chief Justice Burger and Justices Rehnquist, Powell and O'Connor. Justice O'Connor was slightly less conservative than Rehnquist and Powell, and Chief Justice Burger could have been located somewhere between her views and the views of Rehnquist and Powell, who seemed fully committed to restricting Title VII. In the middle, having the single vote that determined the outcome in all disputed Title VII cases between 1980 and 1985 was Justice Byron White. Justice White had the singular distinction of voting with the majority on all eleven cases between October 1980 and July 1985 in which the Court had a substantive impact on the application and enforcement of Title VII. Thus, an attorney preparing a Title VII case for the U.S. Supreme Court in the October 1985 Term should have been fully informed on Justice White's views before submitting any argument to the Court.³⁰⁸

2. Outlook at End of October 1984 Term

Between October 1980 and July 1985, six cases (*Hishon*,³⁰⁹ *Arizona Governing Committee*,³¹⁰ *Newport News Ship Building*,³¹¹ *Teal*,³¹² *Sumitomo*,³¹³ and *Gunther*³¹⁴) expanded the reach of Title VII. Five cases (*Stotts*,³¹⁵ *Baldwin*,³¹⁶ *Ford*,³¹⁷ *Kremer*,³¹⁸ and *American Tobacco*³¹⁹) restricted the jurisdiction, operation, and interpretation of Title VII. None of the decisions studied directly addressed the issues that raged in the media in the summer of 1985, ignited by the nomination of William Bradford Reynolds to the number-three post at the Justice De-

308. Lance Liebman, *Justice White and the Affirmative Action*, 58 U. COLO. L. REV. 471 (1987).

309. 467 U.S. 69 (1984).

310. 463 U.S. 1073 (1983).

311. 462 U.S. 669 (1983).

312. 457 U.S. 440 (1982).

313. 457 U.S. 176 (1982).

314. 452 U.S. 161 (1981).

315. 467 U.S. 561 (1984).

316. 466 U.S. 147 (1984).

317. 458 U.S. 219 (1983).

318. 456 U.S. 461 (1982).

319. 456 U.S. 63 (1982).

partment. Reynolds, and by implication his superiors, Meese and President Reagan, sought to re-argue the question of affirmative action quotas and time tables under Title VII. Nothing so fundamental or basic was presented to the U.S. Supreme Court during the first Reagan term. Most of the decisions by the Court in this period addressed narrowly drawn issues. Moreover, a fair reading of the decisions indicates that the Court was not amenable to making such a revolutionary change in the application and enforcement of Title VII. Consequently, Reynolds, Meese, and President Reagan had to look elsewhere for relief.

My review of Title VII enforcement during Ronald Reagan's first term suggests that the administration's bombastic rhetoric and highly visible public profile were not significantly transformed into action by the EEOC directly or by legal interpretation of Title VII by the U.S. Supreme Court (see Table V for summary.) This finding is consistent with other observations made about the impact of President Carter's activist stance on civil rights enforcement.³²⁰

B. Voting Patterns - 1985-89

The Lexis search of Title VII cases during Ronald Reagan's second term (1985-89) was done in the same manner as the first search.³²¹ Only eighteen relevant cases were found out of the thirty-four Supreme Court citations generated. Two of these cases, *Florida v. Long*³²² and *Watson v. Fort Worth Bank & Trust*,³²³ were treated as two separate cases because they addressed more than one Title VII issue. Therefore, voting patterns on twenty separate cases were generated and analyzed. Of the twenty decisions, six expanded Title VII, seven restricted it, and seven reaffirmed the status quo. This study focused on voting patterns in the expansive or restrictive cases involving the substance of Title VII (see Table V for summary.)

Looking at the voting patterns on significant cases decided between November 1986 and June 1987, the Court appeared to be split into three distinct voting blocks. On the right were Justices Rehnquist and Scalia, who favored restriction of Title VII. Justices Marshall, Brennan, Blackmun and Stevens held the seats of the liberal, or left wing, working to expand Title VII protection. Justices O'Connor, White, and Powell pro-

320. See William A. Wines, *EEOC Conciliation Efforts in the Case of the Willmar Eight*, 34 LAB. L.J. 308 (1984).

321. See *supra* part IV.A.

322. 487 U.S. 223 (1988).

323. 487 U.S. 977 (1988).

TABLE V
COMPARISON OF DECISIONS BY TERM

	Expand VII	Restrict VII	Affirm Status Quo
October 1980 Term			
Substantive	1	0	3
Procedural	1	1	1
October 1981 Term			
Substantive	2	3	2
Procedural	1	0	1
October 1982 Term			
Substantive	2	0	2
Procedural	1	0	0
October 1983 Term			
Substantive	1	2	4
Procedural	2	0	0
October 1984 Term			
Substantive	0	0	3
Procedural	0	0	0
October 1985 Term			
Substantive	1	1	1
Procedural	1	0	1
October 1986 Term			
Substantive	3	1	1
Procedural	0	0	0
October 1987 Term			
Substantive	0	2	1
Procedural	0	2	2
October 1988 Term			
Substantive	0	0	0
Procedural	1	4	0

vided the swing votes that influenced results in either direction depending on the issues at hand. In the three expansive cases during this time period, Justices Marshall, Brennan, Blackmun, and Stevens all had perfect voting patterns with the majority. Only Justice Scalia dissented in all three cases, while Justice Rehnquist dissented in two and voted for the expansion of Title VII in one case. The swing voters were not influenced consistently in any of the cases. Justices White and O'Connor voted with the majority once, dissenting twice; Justice Powell voted with the majority twice, and dissented once. One restrictive case, which addressed an issue of reasonable accommodation for an employee's religious beliefs, did not generate a voting pattern that matched this proposed voting model. In that case, *Ansonia Board of Education v.*

Philbrook,³²⁴ Justices Stevens and Marshall dissented while the other seven made up the majority.³²⁵

The arrangement of the Supreme Court in voting blocks shifted when President Reagan's appointee Justice Anthony Kennedy replaced Justice Powell in February 1988.³²⁶ With this new conservative, the right-wing block consisted of three Justices, leaving only Justices White and O'Connor as the two swing voters. Nine cases between February 1988 and April 1990 were examined. Three decisions expanded and six restricted Title VII. Two of the expansive cases were decided by a unanimous Court. Justices Marshall, Brennan, Blackmun and Stevens were sufficiently influential to gain both swing votes, leaving a perfect right-wing block in dissent. In the six restrictive cases, Justices Rehnquist, Scalia, and Kennedy had perfect voting records with the majority (Kennedy only participated in five decisions). Justices Marshall and Brennan dissented in all six cases, while Justices Blackmun and Stevens dissented in only five. Justice O'Connor voted restrictively in the five cases in which she participated; Justice White joined the majority with his swing vote five of the six times.

The analysis discovered no discernible pattern for swing votes in the Title VII cases from November 1986 to June 1987. Justice O'Connor seemed to be more independent of the conservative block at a time when Justice White was apparently re-examining his earlier posture on Title VII and drifting into a more conservative position. After February 1988, Justices O'Connor and White voted together on twelve out of the fourteen Title VII cases (eighty-six percent of the time). The way in which they voted determined the outcome in almost every case. Their combined vote was determinative in the two crucial cases that signalled a re-examination of the entire disparate impact doctrine, *Watson v. Fort Worth Bank & Trust*³²⁷ and *Wards Cove Packing Co. v. Antonio*.³²⁸

V. A LOOK AT ADMINISTRATIVE SUPPORT FOR U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION SINCE 1980

This part of the Article reviews the Reagan Administration's record in the area of support for the enforcement activities of the Equal Employment Opportunity Commission, the U.S. government's enforcement

324. 479 U.S. 60 (1986).

325. *Id.*

326. See *supra* notes 91-94 and accompanying text.

327. 487 U.S. 977 (1988).

328. 490 U.S. 462 (1989).

arm for Title VII of the Civil Rights Act of 1964. One of the evident trends was a 48% increase in the charges received for processing by the EEOC between fiscal years 1979 and 1984. Funding for the EEOC was \$106.75 million in fiscal year 1979 and \$152.0 million in fiscal year 1984, an actual increase of 42% before inflation. The real increase in funding would be only about half of the actual or gross increase; thus, the U.S. government during the first Reagan administration had met a 48% increase in case load at the EEOC with a real funding increase of slightly over 20%.

Although there had been a dramatic increase in the number of complaints filed under Title VII since 1982, our review of the number of charges filed and processed by the Commission back to 1976 suggests that the numbers were still well within the avalanche of complaints which had been filed in the initial years of the Commission (see Table IV). The 1982 date may be significant for a number of reasons, not the least of which is that 1982 was the year that the Equal Rights Amendment failed.³²⁹ Other possible explanations for the statistical turnaround in 1982 may include the administration's continuing attack on the doctrines of comparable worth and other feminist issues, and the perception by many employees that they were going to have to seek relief from the courts rather than waiting for a broad-based attack on discrimination from the Reagan Administration.

What were the causes of the Reagan funding shortfall for enforcement of equal opportunity in employment? This question can be addressed by examining the ideology and rhetoric of the Reagan Administration officials. What emerges is a rather strong bias against government involvement in free markets and a particularly keen belief that affirmative action, which the Reaganites saw as tied irrevocably to quotas, should be abolished. These ideological positions are matched by a belief that the U.S. Constitution should be interpreted in the same manner as it was by the founding fathers in 1789.³³⁰ Finally, the Reagan

329. See, e.g., Adam Clymer, *Time Runs Out for Proposed Rights Amendment*, N.Y. TIMES, July 1, 1982, at A12.

330. Garry Wills makes an excellent point when he says that "Edwin Meese and other 'original intent' conservatives also want to go back before the Civil War amendments (particularly the Fourteenth) to the original founders. Their job would be comparatively easy if they did not have to work against the values created by the Gettysburg Address." GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 39 (1992). Wills goes on to explain that equality was not mentioned in the Constitution. Lincoln, over the period of the 1850s and up to the Gettysburg Address in November 1863, hammered out a new political ideology in which the phrase "all men are created equal" from the Declaration of Independence was grafted onto and made part of our political heritage as if it had been in the Consti-

appointment record, especially in the area of judicial appointments, failed to mirror the racial and gender diversity of the U.S. public. This section concludes by addressing some of the legal and political issues raised by the Reagan administration's activities in the area of equal employment opportunity.

The Equal Employment Opportunity Commission's fiscal years have run from October 1 through September 30 since 1976.³³¹ In the middle of President Reagan's two terms, it appeared that the public rhetoric from such administration figures as Edwin Meese, the Attorney General; William Bradford Reynolds, Meese's chief deputy for civil rights; and Clarence Pendleton, chairman of the U.S. Civil Rights Commission, were not being transformed into public law. Court decisions refused to embrace the position of the administration on Title VII in areas such as affirmative action and requiring identified discriminatees. However, the budget of the EEOC, adjusted for inflation and case load, had dropped 35.4% from 1979 to 1984. Thus, as late as 1987, it appeared that the Reagan administration had deftly created a major public rhetoric disturbance as a tactical diversion for its main thrust, which consisted of quietly "gutting" the enforcement budget. Due to a downturn in filings, this fiscal trend had rebounded somewhat after 1985 and by 1988 was only 14.5% below the adjusted budget in real terms for 1979 (see accompanying graphs.)

A *Time* magazine³³² survey asked the following question with these results:

'Do blacks in the U.S. have same opportunities
as whites in employment?'

<u>RESPONSE:</u>	<u>Blacks</u>	<u>Whites</u>
Same	26%	59%
NOT the case	71%	37%

This survey information highlighted one of the main obstacles to enforcement of Title VII: Many whites perceive the situation as better for blacks in employment than blacks find it. This misconception defused popular efforts to get the Reagan Administration more involved in Title VII enforcement.

tution all the time. Later, Wills declares: "For most people now, the Declaration means what Lincoln told us it means, as a way of correcting the Constitution itself without overthrowing it. It is this correction of the spirit, this intellectual revolution, that makes attempts to go back beyond Lincoln to some earlier version so feckless." *Id.* at 147.

331. 1976 EEOC Ann. Rep. The 1976 fiscal year was 15 months to accommodate the initial transition. *Id.*

332. Otto Friedrich, *Racism on the Rise*, *TIME*, Feb. 2, 1987, at 18, 21.

In the area of civil rights, the second Reagan Administration seemed content to be looking backwards anyway. Witness the statements of Attorney General Edwin Meese III, Reagan's chief law enforcement officer, to the American Bar Association on July 9, 1985:

In my opinion a drift back toward the radical egalitarianism and expansive civil libertarianism of the Warren Court would once again be a threat to the notion of limited but energetic government.

What, then, should a constitutional jurisprudence actually be? It should be a Jurisprudence of Original Intention. By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence *and* the charge of being either too conservative or too liberal [emphasis in original].

. . . .

. . . To allow the courts to govern simply by what it [sic] views at the time as fair and decent, is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened. A Constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.

Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shocking new theory; nor is it arcane or archaic.³³³

Apparently, the Constitution should be changed only by amendment. The thrust of the Court's constitutional power should be to limit governmental power in keeping with Mr. Meese's ideas.

Assistant Attorney General for Civil Rights William Bradford Reynolds carried the ideological battle to the law schools in a 1986 speech to the Federalist Society in Chicago. According to Reynolds, most law professors are "aligned philosophically with the liberal left" and are more concerned with "cultivating new recruits" to that ideology than they are with teaching the Constitution.³³⁴ The previous month, Meese

333. Attorney General E. Meese III, Address Before the American Bar Association Meeting (July 17, 1985).

334. Robin Wilson, *Law Professors Assailed as Leftists by Justice Department Official*, CHRON. OF HIGHER EDUC., Nov. 26, 1986, at 22.

had alleged that Supreme Court rulings that interpreted the Constitution were not the "supreme law of the land."³³⁵

Asserting that the Supreme Court had sometimes aggrandized its own role, Meese assailed what he called a tendency of some senators and others to place judicial rulings "on a par with the Constitution."³³⁶ The Tulane speech expanded on critiques of the Court that Meese had made since 1985 by suggesting that a Supreme Court decision "binds the parties in the case and also the executive branch for whatever enforcement is necessary," but that "such a decision does not establish a 'supreme law of the land' that is binding on all persons and parts of government, henceforth and forevermore."³³⁷

Rather than "submit to government by the judiciary," Meese argued that citizens should respond with active disagreement. For instance, the Attorney General asserted that legislators might properly propose bills contrary to Supreme Court decisions in recognition that those "decisions do not necessarily determine future public policy."³³⁸ He added that "[e]ach of the three coordinate [sic] branches of government created and empowered by the Constitution - the executive and legislative no less than the judicial - has a duty to interpret the Constitution in the performance of its official functions."³³⁹ Meese seemed unaware that this argument had been advanced before and was laid to rest by the Court in 1803.³⁴⁰

Continuing the attack on the legal establishment initiated by his boss, William Bradford Reynolds asserted that the Constitution itself, by which he meant its history, text, and the intentions of its framers, had become a matter of "passing interest to only a handful of law professors."³⁴¹ Most law schools, Reynolds alleged, approached the Constitution "in a haphazard fashion, leaving it to each professor to shape the curriculum according to his or her favorite, or least favorite, collection of cases."³⁴² In so doing, Mr. Reynolds continued, law schools have "abdicated their responsibility to educate the future members of our profession on the Constitution."³⁴³

335. Stuart Taylor, Jr., *Meese Says Rulings by U.S. High Court Don't Establish Law*, N.Y. TIMES, Oct. 23, 1986, at A1.

336. *Id.*

337. *Id.*

338. *Id.* at A20.

339. *Id.*

340. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

341. Wilson, *supra* note 334.

342. Meese, *supra* note 333.

343. Wilson, *supra* note 334.

Does any hope remain for this Republic if the "One True Meaning" of the Constitution has been lost?³⁴⁴ True to a white, male-consciousness pattern, Meese, Reynolds, and President Reagan embraced a notion that constitutional law boiled down to an either-or understanding of the Constitution. For them, one must either embrace the Constitution as the founding fathers understood it or be in error. There is a right and a wrong way, a binary way to approach the thing.³⁴⁵ As Anne Wilson Schaeff indicates, such dualistic thinking is efficient, but at the cost of oversimplifying alternatives. It reduces thought into a binary system incapable of entertaining multiple "right" solutions.³⁴⁶

From the perspective of white, male consciousness, if women's work is elevated, it must be at the cost of devaluing men's work.³⁴⁷ Thus, it is symptomatic of the white, male consciousness that opponents of affirmative action see themselves "protecting" men from "reverse discrimination" and from hiring systems that no longer, in their opinion, look for qualified job candidates. People with a white, male outlook do not easily embrace the notion of hiring one from a number of qualified candidates; the white, male system insists on reducing alternatives to two and then placing those alternatives in a hierarchy.³⁴⁸ Female consciousness is more accepting of peer relationships and multiple "right" solutions.³⁴⁹ Thus, white, male consciousness seems an ideal stage on which to entertain the Reagan policies on Title VII.

The Justice Department, encouraged by Justice White's language in *Firefighters Local Union No. 1784 v. Stotts*,³⁵⁰ mounted an aggressive campaign for a broad repudiation of affirmative action. The U.S. Supreme Court's rejection of that administrative position was signaled by three decisions in the October 1985 Term but even more emphatically in the October 1986 Term by the decision of *Johnson v. Santa Clara Transportation Agency*.³⁵¹ In *Johnson*, the U.S. Supreme Court by a 6-3 vote established the broad principle that employers who have not previously discriminated against women and minority groups could give mem-

344. Meese, *supra* note 333.

345. ANNE WILSON SCHAEFF, *WOMEN'S REALITY: AN EMERGING FEMALE SYSTEM IN THE WHITE MALE SOCIETY* (1981).

346. *Id.* at 149.

347. *Id.* at 104-07.

348. *Id.* at 99-143.

349. *Id.* at 149-51.

350. 467 U.S. 561 (1984).

351. 480 U.S. 616 (1987).

bers of those groups preferences in hiring and promotions to promote balance in traditionally segregated job categories.³⁵²

Barry Goldstein, a lawyer with the NAACP Legal Defense and Education Fund, greeted the *Johnson*³⁵³ decision with the opinion that the Administration's campaign may have helped the Court move off the fence. He stated:

I think the extreme position of the Justice Department in the last six years, just categorically saying that affirmative action was unnecessary, that it was illegal and immoral, was counterproductive and helped to define the issue clearly for the Court. It looked at the Justice Department position and saw that it had no substance.³⁵⁴

Terry Eastland, the Justice Department's top spokesman, responded to such criticism by saying that the Department would continue to argue for its reading of the Constitution and precedents. Asked how the Administration might hope to regain the ground it had lost in recent decisions, Eastland replied, "a new appointment or two."³⁵⁵

Eastland may have been overly pessimistic about the Reagan Administration's success in foiling enforcement of Title VII. Even though, as of 1986, it had not yet prevailed in the high Court, the Reagan Administration had slowed down progress in the elimination of discrimination from the workplace. One of the ways that the Administration was effective was in limiting the budget for the EEOC, the enforcement arm of Title VII. Moreover, even though the gross budget increases did not keep pace with the increased filings of Title VII complaints, the matter worsens when the budget is adjusted for inflation.

352. *Id.* at 637. See Stuart Taylor Jr., *Court's Change of Course*, N.Y. TIMES, March 27, 1987, at A1.

353. *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616 (1987).

354. Taylor, *supra* note 335, at A17.

355. *Id.*

TABLE VI
BUDGET, CPI INDEX, AND FILINGS

Year	# of Complaints	Budget (millions)	Unadjusted Budget per 1000 complaints (millions)	CPI all items	Change per year	Deflator with 1979 as base year	Inflation Adjusted Budget per 1000 complaints
78				67.7			
79	32,279	\$106.75	\$3.03	76.7	13.29%	1.0000	\$3.03
80	45,382	\$134.31	\$2.96	86.3	12.52%	0.8748	\$2.59
81	44,992	\$137.88	\$3.06	94.0	8.92%	0.7968	\$2.44
82	41,629	\$140.96	\$3.39	97.6	3.83%	0.7663	\$2.59
83	50,506	\$147.42	\$2.92	101.3	3.79%	0.7372	\$2.15
84	52,130	\$154.04	\$2.95	105.3	3.95%	0.7081	\$2.09
85	53,343	\$163.66	\$3.07	109.3	3.80%	0.6812	\$2.09
86	50,110	\$157.91	\$3.15	110.5	1.10%	0.6737	\$2.12
87	45,401	\$169.53	\$3.73	115.4	4.43%	0.6439	\$2.40
88	42,657	\$179.81	\$4.22	120.5	4.42%	0.6154	\$2.59

1. Source: Executive Office of the President: Office of Management and Budget, Budget of the United States Government (Washington, DC: Government Printing Office), for Fiscal Years 1987, 1988, 1989.

2. Budget divided by number of Title VII complaints multiplied by 1000.

3. United States Department of Labor, CPI Detailed Report, (Washington, DC: Government Printing Office, 1989), 16.

Finally, to put the increased case load and the decreased purchasing power in perspective, look at the budget in real terms per one thousand cases.

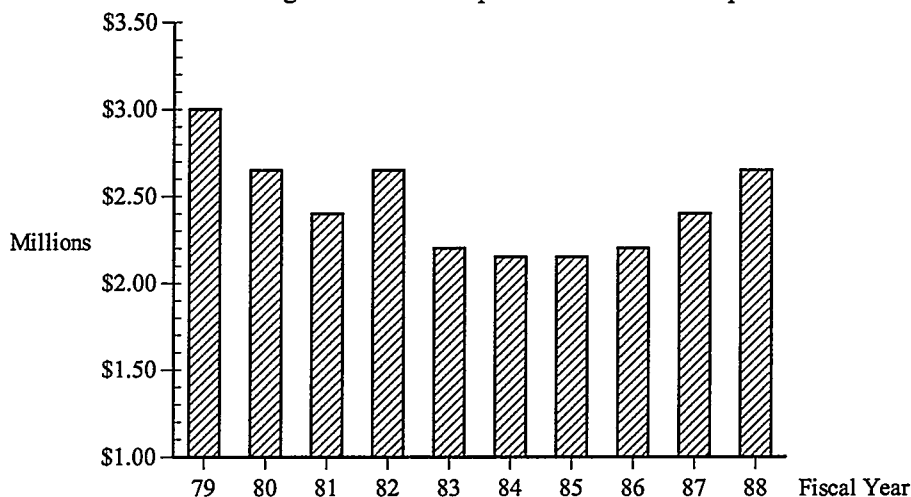
More difficult to measure, but perhaps more insidious, was the social impact that the Reagan Administration position had on affirmative action. In the 1970s, racial slurs and jokes seemed an endangered species.³⁵⁶ That no longer appears to be the case. The Meese-Reagan-Reynolds-Reagan public utterances have rehabilitated some forms of racism and sexism. Moreover, given the public opposition from the Reagan administration to affirmative action and the underfunding of the enforcement mechanism, employers no longer have much to worry about when it comes to federal enforcement of the antidiscrimination employment laws.³⁵⁷ These assertions are supported by a variety of statistical indicators.

356. JOHNSON, *supra* note 23, at 203, 469-70.

357. One EEOC employee, who for obvious reasons asked to remain anonymous, told this researcher that field investigators who proved "too enthusiastic about enforcement" often found themselves reassigned to answering telephones at the home office.

Graph A

EEOC Budget in Real Terms per 1000 Title VII Complaints



Look at the figures for the number of women and minorities in U.S. graduate schools: the number of women increased by 7.8% from 1976-77 to 1984-85; blacks declined by 19.2%; Hispanics increased 20.4%; and Asians increased by 54.4%. In absolute numbers, the drop in black enrollments in graduate schools was 12,518; the increase in Hispanics and Asians combined totaled only 14,184.³⁵⁸

Women's wages in the U.S. as a percentage of men's wages by age of the women start at 92% for women under 20 years of age, drop to 64% by the time women are 35 to 44 years old, and finally drop to 61% for women over 45 years of age.³⁵⁹ On the average, and the numbers are worse in the South and the West, women at the vice-presidential level and above make 42% less annually than men.³⁶⁰

One survey of women executives found that more than half felt blocked or delayed at one time in their careers because they were women, and 48% said they had received an unwanted sexual advance from a superior or a client.³⁶¹ Seventy-two percent of these women executives

358. *Higher Education*, WALL ST. J., Sept. 23, 1986, at 37.

359. *Women's Wages*, WALL ST. J., Feb. 20, 1987, at 23.

360. *Women's Salaries*, WALL ST. J., Jan. 28, 1987, at 31.

361. Cathy Trost, *A Special News Report on People and Their Jobs in Offices, Fields and Factories*, WALL ST. J., Sept. 9, 1986, at 1.

said that reconciling home and work was difficult.³⁶² Yet despite these problems, most of the women were "optimistic about the future, especially when men below 45 years of age today" move up the corporate hierarchies.³⁶³

It is, perhaps, difficult to over-estimate the negative impact that the Reagan administration's position has had on social attitudes in the U.S. The legitimatizing of racist and sexist attitudes has led to some ugly incidents on college campuses and in corporate recruiting.³⁶⁴ The *Wall Street Journal* reported as early as 1986 the following recruitment changes:

Recruiters say their clients rarely seek women or minority-group members to fill management slots. Christian & Timbers Inc. hasn't seen any such requests for two years, compared with a few each year previously

*The result of the silence: "White executives don't see the problem and blacks avoid going against the grain," says New Jersey consultant Edward Jones Jr.*³⁶⁵

VI. THE CASE OF *WATSON V. FORT WORTH BANK & TRUST*³⁶⁶

The issue of whether subjective hiring practices are covered by Title VII was presented to the Court in *Watson*;³⁶⁷ the plurality opinion by Justice Sandra Day O'Connor responded by reducing the burden of proof initially established in *Griggs v. Duke Power*³⁶⁸ and by requiring practice-by-practice statistical proof of causation even where such proof may be impossible.³⁶⁹ Without a fifth vote, however, this opinion did not have any precedential value beyond the bare conclusion that the dispa-

362. *Id.*

363. *Id.*

364. See, e.g., Martha Chamallas, *Evolving Concepts of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983); David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790 (1991); William N. Eskridge, *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991); Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 896 (1993); Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 790 (1991); Constance B. Motley, *The Supreme Court Civil Rights Litigation, and Deja Vu*, 76 CORNELL L. REV. 643 (1990); Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896 (1993).

365. Jeanne Saddler, *A Special News Report on People and Their Jobs in Offices, Fields and Factories*, WALL ST. J., Sept. 2, 1986, at 1.

366. 487 U.S. 977 (1988).

367. *Watson*, 487 U.S. at 991.

368. 401 U.S. 424 (1971).

369. *Watson*, 487 U.S. at 994-99.

rate impact analysis applied to subjective hiring decisions, a judgment concurred in by all eight justices.³⁷⁰

Much media attention was paid to the *Wards Cove Packing Co. v. Atonio*³⁷¹ case in the summer of 1989.³⁷² Actually, the majority opinion by Justice White mostly wrote Justice O'Connor's plurality opinion in *Watson*³⁷³ into law. Thus, this section focuses on the *Watson* opinion by Justice O'Connor and analyzes the changes that it brought to Title VII enforcement until Congress overrode it in the Civil Rights Act of 1991.

In *Watson*, the Supreme Court considered the appeal of a black woman who sued her former employer, a bank, alleging racial discrimination. The trial court entered judgment on the merits in favor of the bank. On appeal, a Fifth Circuit panel affirmed in part, vacated in part, and remanded.³⁷⁴ This Article does not address the issues related to certification or decertification of a class of employees for purposes of a Title VII action. Rather, it focuses on whether disparate impact analysis is an appropriate vehicle for analyzing discretionary hiring practices under Title VII and on what the appropriate standards for the burden of proof should be.

The Supreme Court granted certiorari to examine the question of whether a disparate impact analysis, historically used to statistically examine the role of standardized tests in employment screening, should also be used to test subjective hiring and promotion practices. In a plurality opinion, Justice O'Connor held that such analysis would be appropriate and went on to specify evidentiary burdens and allocate such burdens to the parties.³⁷⁵ Although agreeing that such analysis was appropriate, a three-judge faction led by Justice Blackmun parted company with O'Connor on the evidentiary analysis.³⁷⁶ Justice Stevens concurred in judgment and wrote a separate opinion.³⁷⁷ Justice Kennedy did not participate.³⁷⁸ Thus, the Court split 4-3-1 on a potentially dramatic turn-

370. For an excellent discussion of this point, see Linda L. Holdeman, *Watson v. Ft. Worth Bank and Trust: The Changing Face of Disparate Impact*, DENV. U. L. REV. 179 (1989).

371. 490 U.S. 642 (1989).

372. See, e.g., Robert Bork, *The Supreme Court and Civil Rights*, WALL ST. J., June 30, 1989, at A12; Martha Brannigan, *EEOC, After Two Court Rulings, Weighs Damages to U.S. Job Discrimination Suits*, WALL ST. J., July 20, 1989, at B5; Stephen Wermeil, *Justices Affirm Interpretation of Rights Law*, WALL ST. J., June 16, 1989, at A8.

373. 487 U.S. 977 (1988).

374. *Id.* at 982-83.

375. *Id.* at 1001.

376. *Id.* at 1000 (Blackmun, J., concurring in part).

377. *Id.* at 1011 (Stevens, J., concurring).

378. *Id.* at 1000.

ing point in judicial interpretation of Title VII. On June 5, 1989, when the case of *Wards Cove Packing Co. v. Atonio*³⁷⁹ was decided, the potential became law. The difference one year after *Watson* was the fifth vote provided by Justice Kennedy, who had not participated in the first case. This time, Justice Stevens wrote a dissent in which Blackmun, Marshall, and Brennan joined.³⁸⁰

The origin of this dispute is Title VII of the 1964 Civil Rights Act, which clearly outlawed intentional and overt (direct) discrimination in the terms and conditions of employment based on race, color, religion, national origin, or sex.³⁸¹ What was not clear until 1971 was whether the Act also reached indirect discrimination caused by employment screening using factors neutral on their face and not directly related to the job that had a statistically negative impact on the protected classifications. In *Griggs v. Duke Power Co.*,³⁸² the Supreme Court answered that question unanimously by asserting that Title VII prohibited employers from measuring the job applicant in the abstract, as opposed to measuring the job applicant for the task.³⁸³ In a case that came to the Court in a difficult posture, namely, without any proof of intent to discriminate under circumstances where a corporate attempt to evade the spirit of the law was clearly indicated, the Court held that proof of intent to discriminate was not a requirement where the other factors of "disparate impact" were present.³⁸⁴ There has been much commentary on *Griggs* in law

379. 490 U.S. 642 (1989).

380. *Id.* at 662 (Stevens, J., dissenting).

381. 42 U.S.C. §§ 2000e-15 (1976).

382. 401 U.S. 424 (1971).

383. *Id.* at 434-36.

384. *Id.* at 429-33.

reviews,³⁸⁵ and in keeping with the conservative fashion of the Reagan era, some of the recent commentary has been decidedly critical.³⁸⁶

In *Griggs*, the Supreme Court held that the burden of proof was on the employer to show the job-relatedness of employment criteria that statistically discriminated against protected groups.³⁸⁷ In her plurality opinion in *Watson*, however, Justice O'Connor stated baldly:

Although we have said that an employer has "the burden of showing that any given requirement must have a manifest relationship to the employment in question," *Griggs*, 401 U.S. at 432, 91 S.Ct. at 854, such formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.³⁸⁸

Her use of the word "should" here is a curious irony. No citation or support is offered for such a conclusion; nearly all textbooks give the exact interpretation that Justice O'Connor says we must not give *Griggs*.³⁸⁹

A. Case History

In August 1973, Clara Watson, a black woman, was hired by Fort Worth Bank & Trust as a proof operator. In January 1976, Watson was promoted to teller in the bank's drive-in facility. Between January 1980

385. See, e.g., Martha Chamallas, *Exploring the 'Entire Spectrum' of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 39; Maxine N. Eichner, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397 (1988); William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L. J. 331 (1991); Barbara J. Flagg, "I Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Julia Lambert, *Discretionary Decision Making: The Application of Title VII's Disparate Impact Theory*, 1985 U. ILL. L. REV. 869; David B. Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899 (1993); Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524 (1987); Joel L. Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong?* 1985 U. ILL. L. REV. 785.

386. See, e.g., Michael E. Gold, *Griggs Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 INDUS. REL. L.J. 429 (1985).

387. *Griggs*, 401 U.S. at 431-32.

388. *Watson*, 487 U.S. at 997.

389. PATRICK CIHON & JAMES CASTAGNERE, *LABOR AND EMPLOYMENT LAW* 304-05 (1988); JAMES LEDVINKA & VIDA G. SCARPELLO, *FEDERAL REGULATION OF PERSONNEL AND HUMAN RESOURCE MANAGEMENT* 45-50 (1992); MACK PLAYER, *FEDERAL LAW OF EMPLOYMENT DISCRIMINATION* 164-65 (2d ed. 1981).

and February 1981, Watson sought four promotions and was denied all four in favor of white employees. The bank, which had about eighty employees, had not developed formal criteria for evaluating candidates for the positions for which Watson unsuccessfully applied. Instead, it relied upon the subjective judgment of the supervisors who were acquainted with the candidates and with the natures of the jobs to be filled. All the bank supervisors involved in the four promotions at issue were white.³⁹⁰

Watson filed a discrimination charge with the EEOC. After exhausting her administrative remedies, she brought suit in federal district court. As to Watson's individual claims, the district court applied the evidentiary standards developed for disparate treatment cases. Watson was held to have established a *prima facie* case of disparate treatment, but the court held that the bank had successfully met its rebuttal burden of presenting legitimate and nondiscriminatory reasons for each of the challenged promotions.³⁹¹ The district court concluded that Watson had failed on rebuttal to show that the reasons were pretexts for racial discrimination and dismissed the action.

On appeal, Watson argued that the lower court had improperly failed to apply the "disparate impact" analysis to her claims of discrimination in promotion. A majority of the Fifth Circuit Court of Appeals panel held that "a Title VII challenge to an allegedly discretionary promotion system is properly analyzed under the disparate treatment model rather than the disparate impact model."³⁹² For this conclusion, the panel cited Fifth Circuit precedent.³⁹³ Other circuits, notably the Ninth, the Eleventh, and the D.C., have held otherwise.³⁹⁴ Thus, the Supreme Court granted certiorari to resolve the split between the circuits.³⁹⁵

B. The Plurality Opinion in Watson

Very narrowly read, the *Watson* decision stands for the proposition that disparate impact analysis is appropriate for subjective hiring and promotion decisions.³⁹⁶ After all, it was to resolve a conflict between circuits on that question that the Supreme Court granted certiorari.

390. *Watson*, 487 U.S. at 982.

391. *Id.* at 983.

392. *Watson v. Fort Worth Bank & Trust*, 798 F.2d 791, 797 (5th Cir. 1986).

393. *Id.*

394. *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1485 (9th Cir. 1987)(en banc).

395. *Watson*, 487 U.S. at 984-85.

396. Some commentators who identified with the Reagan agenda saw the *Watson* decision as supporting a much broader reading. *See, e.g., William Bradford Reynolds, The Reagan*

Eight justices concurred in that result; only four justices, O'Connor included, subscribed to her far-reaching dicta on burdens of production and persuasion.

In *Watson*, Justice O'Connor was allegedly providing guidance for the district court if and when it would retry the case on remand, since the first order of business for the Fifth Circuit was to determine whether a disparate impact case had been established under the Court's revised guidelines.³⁹⁷ However, O'Connor appeared to deliberately blur the opinion so that it may appear to apply to all disparate impact cases thereafter and *not* just the subjective hiring and promotion cases. For instance, O'Connor stated: "We have cautioned that these shifting burdens are meant only to aid courts and litigants in arranging the presentation of evidence: 'The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'"³⁹⁸ It is a small but important point that *Texas Department of Community Affairs v. Burdine*,³⁹⁹ the case cited for the above proposition, was a disparate treatment case. Similarly, a few pages later in the opinion, O'Connor tossed out this line: "Our previous decisions offer guidance, but today's extension of disparate impact analysis calls for a fresh and somewhat closer examination of the constraints that operate to keep that analysis within its proper bounds."⁴⁰⁰ The cumulative force of this opinion leaves the impression — blurry and not easily supported by citation — that the Supreme Court in *Watson* had issued new and for the first time definitive guidelines for the burden of proof in all disparate impact cases.⁴⁰¹

In dissent, Justice Blackmun seemed unsure as to whether the plurality's standards reached only subjective hiring and promotion cases or whether the attempt was to carve out brand new standards for all disparate impact cases. In any event, even if we take a narrow reading, Blackmun pointed out that an employer need only add a few subjective factors to the hiring/promotion criteria in order to undercut the stricter standards established by *Griggs v. Duke Power Co.*⁴⁰²

Administration's Civil Rights Policy: The Challenge for the Future, 42 VAND. L. REV. 993, 997-98 (1989).

397. *Watson*, 487 U.S. at 1000.

398. *Id.* at 986.

399. 450 U.S. 248 (1981).

400. *Watson*, 487 U.S. at 994 (footnote omitted).

401. *Leading Cases*, 102 HARV. L. REV. 143, 316-17 (1988).

402. *Watson*, 487 U.S. at 1009-10 (Blackmun, J., concurring).

As noted above, the plurality decision in *Watson* borrowed language from disparate treatment cases and applied the quotes directly to the case at bar. Other instances of blurring the distinction between the two types of cases included characterizing the employer's burden as one of "production" that required it to articulate "a legitimate, nondiscriminatory reason" for rejecting the plaintiff.⁴⁰³

C. Old Hostility & Bad History

Both O'Connor's plurality opinion in *Watson* and White's majority opinion in *Wards Cove* reflect old hostilities toward the concept of disparate impact. Justice White, a member of the unanimous Court that decided *Griggs*, has since drifted away from his concurrence and now, according to one commentator, embraces the argument that Title VII does not authorize relief for protecting groups as groups.⁴⁰⁴ To elaborate, Justice White would have held — if he could have gotten the votes — that only individual blacks and other direct victims of discrimination could benefit from remedial orders, and that federal judges should not order (and unions and employers violate the law if they adopt) the awarding of job opportunities by racial quota.⁴⁰⁵ As some have argued, the logic of *Griggs* presents a limited set of options, starting with criteria validation, moving through to self-correction as measured by result, to the imposition of quotas.⁴⁰⁶ Since, according to one authority, all job opportunities are subject to chance and arbitrariness, if not outright caprice, *Griggs* had unavoidably moved the nation toward imposition of quotas⁴⁰⁷ and threatened the well-being of the Republic.⁴⁰⁸

The hostility of some respected commentators to *Griggs* and affirmative action in general seems based on this notion that both are inextricably linked to numerical quotas. This observation is true not only for jurists such as White, O'Connor, and Rehnquist, but also for politicians such as Bush, Reagan, Reynolds, and Meese. This coupling may have originated in 1975 with the publication of *Affirmative Discrimination: Ethnic Inequality and Public Policy* by Nathan Glazer, a sociologist.⁴⁰⁹

403. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (cited in *Leading Cases*, *supra* note 401, at 315 n.47).

404. Liebman, *supra* note 308, at 481.

405. *Id.* at 482.

406. *Id.* at 474.

407. *Id.* at 473-74.

408. *Id.* at 486.

409. NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY & PUBLIC POLICY* xi, 33-76 (1978).

Such linkage has been continued in recent law review observations as "[q]uotas and adverse impact [disparate impact] are practically synonymous."⁴¹⁰ The "link" between affirmative action and quotas, a virtual buzzword⁴¹¹ for the Republican administrations since 1980, finally emerged in a Supreme Court decision in 1988 when Justice O'Connor endorsed it in her plurality opinion in *Watson*.⁴¹² Justice O'Connor then used the retreat-into-quotas argument as the springboard for her revision of the evidentiary standards in Title VII disparate impact cases.⁴¹³ In this passage, fully endorsed by a majority of the Court one year later,⁴¹⁴ the political rhetoric of the Reagan Administration finally found its way into law.⁴¹⁵

Some of the current hostility toward affirmative action in general and *Griggs* specifically is based on Chicago School of Economics theory and its commitment to efficiency.⁴¹⁶ This libertarian and neo-classical devotion to theories of supply and demand and free markets is anchored to the assumptions of Adam Smith.⁴¹⁷ Many of those underlying assump-

410. Gold, *supra* note 386, at 457.

411. See, e.g., Will, *supra* note 45.

412. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 989 (1988), wherein Justice O'Connor writes "They [Respondent and the United States - appearing as *amicus curiae*] also argue that subjective selection practices would be so impossibly difficult to defend under disparate impact analysis that employers would be forced to adopt numerical quotas in order to avoid liability." *Id.*

413. *Id.* at 993-94.

Respondent and the United States are thus correct when they argue that extending disparate impact analysis to subjective employment practices has the potential to create a Hobson's choice for employers and thus to lead in practice to perverse results. If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. . . .

Because Congress has so clearly and emphatically expressed its intent that Title VII not lead to this result [i.e., quotas], 42 U.S.C. section 2000e-2(j), we think it imperative to explain in some detail why the evidentiary standards that apply in these cases should serve as adequate safeguards against the danger that Congress recognized.

Id.

414. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989).

415. For a contrary argument on the success of the Reagan administration on civil rights, see Drew S. Days, III, *The Courts' Response to the Reagan Civil Rights Agenda*, 42 VAND. L. REV. 1003 (1989).

416. For a critique, see Dawn Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235 (1971).

417. See R. Larry Reynolds & William A. Wines, *The Ethical Implications of Various Schools of Economic Thought* (Aug. 7, 1992), (unpublished paper, presented at Society for Business Ethics Meeting, Las Vegas, NV).

tions are not realistic or are subject to criticism for both methodological reasons⁴¹⁸ and for reflecting value choices that are not morally justifiable.⁴¹⁹

The bad history, of course, was Justice O'Connor's insistence that *Griggs* "should" not be read to shift the burden of proof to the defendant after a statistical showing of disparate impact by the plaintiff, that the defendant must show which specific employment practice caused the complained-of discrimination, and that the ultimate legal issue in disparate impact is no different than in disparate treatment.⁴²⁰ Justice Blackmun's opinion in *Watson*⁴²¹ and Justice Stevens' dissent in *Wards Cove*⁴²² adequately and persuasively document a very different history, one which does not accord with Justice O'Connor's revisionist ideas.

D. Observations

Although courts in the wake of *Griggs* "routinely invalidated objective criteria that produced lower rates of hiring and advancement by minorities in blue-collar jobs, selection decisions for professional and managerial jobs, usually based upon subjective factors, remained largely resistant to Title VII challenge."⁴²³ One can, if so disposed, then read the *Watson-Wards Cove* results in a Marxist way as insulating the oppressor class from the leveling influences used against working-class employment discrimination. That noted, consider the conflicting underlying moral values. White and O'Connor read Title VII to require meritocratic, open opportunity, whereas Blackmun and Stevens argue for a legacy of discrimination approach that embraces elements of compensatory preferment.

This split has its roots in the subtle duality of the *Griggs* opinion itself. On one hand, the *Griggs* Court declared itself for merit by asserting that "[d]iscriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed."⁴²⁴ But the same unanimous Court also endorsed the legacy of discrimination notions em-

418. See, e.g., Zimarowski, Radzicki, & Wines, *An Institutional Perspective on Law and Economics (Chicago style) in the Context of United States Labor Law*, 35 ARIZ. L. REV. 397 (1993).

419. See, e.g., Robert Kuttner, *The Poverty of Economics*, THE ATLANTIC MONTHLY, Feb. 1985, at 74-84.

420. *Watson*, 487 U.S. at 987, 993-98 (1988).

421. *Id.* at 1000 (Blackmun, J., concurring).

422. *Wards Cove*, 490 U.S. at 662 (1989) (Stevens, J., dissenting).

423. *Leading Cases*, *supra* note 401, at 309 (citing Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 952, 959-78 (1982)).

424. *Id.* at 318 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

braced by Blackmun when it held that facially neutral practices adopted without discriminatory intent may violate Title VII "if they operate to 'freeze' the status quo of prior discriminatory employment practices."⁴²⁵ The Court also noted in *Griggs* that if blacks "have been denied educational opportunities in segregated schools, then literacy tests that deny many the right to vote and written exams that deny others the chance to earn a living handling coal tend to perpetuate past discrimination by assuring that those intentionally denied educational opportunities also lose political and economic opportunities."⁴²⁶ This conflict in the underlying theories of Title VII has provided much of the grist for the political conflict between liberals and conservatives since 1980. Opposition to racial quotas was a central belief of William Bradford Reynolds, Edwin Meese, Ronald Reagan, and George Bush.⁴²⁷ This underlying philosophical conflict suggests some of the basic divisions in theories of distributive justice as well as in theories of ethics. The divisions are profound. The debate between the majority and dissent in *Watson-Wards Cove* might be better served by directly addressing these differences rather than obscuring them with awkward attempts at reinterpretation of well-known precedents.

A final observation is that the subjective-objective criteria for employment and promotion evidentiary standards seems generally unsatisfactory as a legal classification standard. It is not a clean dichotomy, but rather a continuum between two poles. In practice, courts might find the distinction elusive and the factors mixed.⁴²⁸ However, after November 1991, Congressional action has eliminated these and other potential confusions by reversing *Watson* and *Wards Cove*. We now turn to that legislation.

VI. THE 1991 CIVIL RIGHTS ACT

As part of a continuing effort to confront President Bush with the emerging backlash from a decade of executive branch indifference and hostility toward the enforcement of the employment discrimination laws, Congress passed the Civil Rights Act of 1991, legislation that reversed some of the more extreme decisions of the Rehnquist Court in the area of Title VII. Surprisingly, this legislation was signed into law by Presi-

425. *Id.* at 319 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971)).

426. *Id.* at 320.

427. Stuart Taylor Jr., *Breaking New Ground on Affirmative Action*, N.Y. TIMES, May 21, 1986, at A28.

428. Patricia Patterson, The "Appropriate" Disparate Impact Case 13-14 (Apr. 14, 1989) (unpublished manuscript).

dent George Bush on November 21, 1991 "to end a bruising two-year fight over job discrimination."⁴²⁹ Only the previous year, Bush vetoed a very similar bill and watched an override attempt fail by one vote in the Senate.⁴³⁰ The conflict between Congress and the administration centered on the perception that the impact of the proposed legislation would reach farther than its stated objectives.

President Bush was heavily criticized for vetoing the 1990 version of the Civil Rights Act. As re-election grew nearer, he appeared to embrace the 1991 version. However, changes in the 1991 version were mostly cosmetic. They included the addition of a section on the foreign employment of U.S. citizens,⁴³¹ the formation of committees to study and monitor the "glass ceiling" phenomena,⁴³² and technical assistance training.⁴³³ The most profound change was the elimination of explicit retroactivity provisions.⁴³⁴ The ambiguity on this issue of retroactivity appears to leave resolution to the discretion of the federal courts.⁴³⁵

Equally noteworthy was the attachment of a formal signing statement by President Bush. Written by C. Boyden Gray, counsel to the President, it included a passage that supported a memorandum written by Senator Bob Dole of Kansas. The memorandum addressed the issue of the use of "business necessity" as a defense for hiring discrimination, and described the bill as an "affirmation of existing law," including decisions made by the Supreme Court."⁴³⁶ The potential impact of the written statement would be to reverse or minimize the effect of some portions of the Act itself.

The purpose of the Act as stated in the bill was—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

429. Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at A1.

430. Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 CAL. L. REV. 775 n.7 (1991). See also SAVAGE, *supra* note 5, at 457-58 (Bush's change of mind on civil rights bill actually was an acknowledgment that Congress had enough votes to override another veto); Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035 (1992).

431. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1077-78.

432. *Id.* §§ 201-03, 105 Stat. 1081-84.

433. *Id.* § 10, 105 Stat. 1078.

434. Estrin, *supra* note 430, at 2035-36.

435. *Id.* at 2036.

436. Andrew Rosenthal, *President Tries to Quell Furor on Interpreting Scope of New Law*, N.Y. TIMES, Nov. 22, 1991, at A1.

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*⁴³⁷ and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*;⁴³⁸ (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under Title VII of the Civil Rights Act of 1964;⁴³⁹ and (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.⁴⁴⁰

The executive branch and Congress had conflicting motives for passing the Civil Rights Act of 1991. The role that Congress saw for the Act was to override the Supreme Court decisions that had narrowed the scope of Title VII during 1988 and 1989 and to provide for damages in cases of intentional employment discrimination. The executive branch saw the Civil Rights Act of 1991 as an opportunity to improve its image before President Bush's bid for re-election.

The legislation has four main parts: Title I is the most important and addresses federal civil rights remedies; Title II speaks to glass ceiling issues; Title III (the longest title) extends civil rights to Senate employees and establishes the Office of Senate Fair Employment Practices; and Title IV has two general provisions - one on severability of the provisions in the Act and a second on the effective date. The major issues addressed in the Act are:

(1) The recovery of punitive damages in cases of intentional discrimination in employment. Punitive damages have limitations outlined in the Act and go beyond relief afforded by § 706(g) of the Civil Rights Act of 1964.

(2) The burden of proof in cases that involve disparate impact is the responsibility of the respondent. The employer must prove that the challenged practice is job-related and consistent with business necessity.

(3) A prohibition against the use, or the adjustment of test scores to discriminate in employment for reasons of race, color, religion, sex, or national origin.

(4) The prompt resolution of challenges to employment practices using litigation, consent judgments, or court orders.

437. 401 U.S. 424 (1971).

438. 490 U.S. 642 (1989).

439. 42 U.S.C. 2000e et seq.

440. Civil Rights Act of 1992, Pub. L. No. 102-166, § 3, 105 Stat. 1071.

(5) Protection of U.S. citizens employed extra-territorially in accordance with the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990.

(6) Sections 110 and 111 address the issues of training, education, and outreach.

(7) Title II of the Act addresses the continuing issue of the "glass ceiling" effect in limiting the promotion of women and minorities. It establishes a committee to study the issue and make recommendations concerning the elimination of artificial barriers to the advancement of women and minorities.

(8) Title III, wherein the Senate makes itself subject to the Act with detailed limitations, does not fall within the scope of this Article and will not be discussed further.⁴⁴¹

The 1991 Civil Rights Act directly addressed the Supreme Court's rulings in a number of decisions. A short summary of the decisions which were affected would include:

a. *Wards Cove Packing Co. v. Antonio*.⁴⁴² Although some commentators have expressed doubts,⁴⁴³ most read the Act as reversing the modifications of disparate impact doctrine contained in *Wards Cove*.⁴⁴⁴

b. *Lorance v. AT&T Technologies, Inc.*⁴⁴⁵ The Act allows a seniority system that is thought to intentionally discriminate to be challenged when it is adopted, when the parties become subject to it, or when it actually affects the charging parties.⁴⁴⁶ In *Lorance*, the Court had limited challenges to the time when the system is initiated.⁴⁴⁷

c. *Price Waterhouse v. Hopkins*.⁴⁴⁸ In the "mixed-motive" discrimination cases, the Act prescribes injunctive relief against future violations, declaratory relief, and attorney fees for the plaintiff. Hiring, reinstatement, or promotion cannot be ordered. The defendant can no longer walk away from the case by showing it would have reached the same result in the absence of discrimination.⁴⁴⁹

441. *Id.* §§ 301-24, 105 Stat. 1088-99.

442. 490 U.S. 642 (1989).

443. See, e.g., C. Ray Gullett, *The Civil Rights Act of 1991: Did it Really Overturn Wards Cove?*, 43 LAB. L.J. 462 (1992).

444. Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074.

445. 490 U.S. 900 (1989).

446. § 112, 105 Stat. at 1078-79.

447. *Lorance*, 490 U.S. at 910.

448. 490 U.S. 228 (1989).

449. §§ 102, 103, 105 Stat. at 1072-74.

d. *Martin v. Wilks*.⁴⁵⁰ In this case, the Supreme Court held that white firefighters who were not parties to an affirmative action consent decree were not estopped from challenging it years later. The Act prohibits such challenges if the parties had notice of the judgment when made and a reasonable opportunity to present their objections or if the parties were adequately represented in the proceedings by others with similar interests.⁴⁵¹

e. *EEOC v. Arabian American Oil Co.*⁴⁵² Under this ruling, U.S. citizens employed outside the country by American firms were excluded from Title VII coverage.⁴⁵³ Now, extra-territorial coverage of citizens is specifically provided.⁴⁵⁴

f. *West Virginia University Hospitals, Inc. v. Casey*.⁴⁵⁵ Litigation costs for Title VII purposes were held not to include expert witness fees.⁴⁵⁶ Now such fees are covered in addition to attorney's fees.⁴⁵⁷

The 1987 rejection of Robert Bork's nomination to the Supreme Court should have been an early warning signal for the Bush Administration. That action presaged the socially explosive Clarence Thomas - Anita Hill confirmation hearings in the summer of 1991, which aroused public opinion⁴⁵⁸ and foreshadowed the passage of the Civil Rights Act of 1991. Apparently, U.S. society and its elected Congress could no longer tolerate the Supreme Court's efforts to radically re-draft the protections that had formerly been available to victims of employment discrimination.

Attachment of Gray's written statement represented a desperate damage control measure by the Bush Administration. The vague wording of the Act left a legacy of confusion over the issue of retroactivity.⁴⁵⁹ The point in question is whether the law applies retroactively to cases

450. 490 U.S. 755 (1989).

451. § 108, 105 Stat. at 1076.

452. 111 S. Ct. 1227 (1991).

453. *Arabian Am. Oil*, 111 S. Ct. at 1235.

454. § 109, 105 Stat. at 1077.

455. 111 S. Ct. 1138 (1991).

456. *Casey*, 111 S. Ct. at 1143.

457. § 113, 105 Stat. 1079.

458. The divisiveness of the Anita Hill-Clarence Thomas hearings lingers on three years later. See, e.g., Lincoln Caplan, *Who Lied?*, NEWSWEEK, Nov. 14, 1994, at 52. A current survey states that 40% of Americans surveyed believe that Justice Thomas sexually harassed Anita Hill and 26% do not know. *Id.* See also Ellen Goodman, *It's Been Three Years, But Clarence Thomas vs. Anita Hill Still Matters*, IDAHO STATESMAN, Nov. 15, 1994, at 7A (column written for the BOSTON GLOBE); JANE MAYER & JILL ABRAMSON, *STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS* (1994).

459. Whether the 1991 Civil Rights Act should be applied retroactively is a matter much debated in the current literature. For a position in favor of retroactivity, see, Michele A. Estrin, Note, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90

pending on the date of enactment. Since the passage of the Act, the courts have been split on the issue of retroactivity.⁴⁶⁰

Historically, the Supreme Court has been inconsistent in its treatment of this issue. In *Bowen v. Georgetown University Hospital*,⁴⁶¹ the Court held that unless clearly worded otherwise, congressional enactments would not be assumed retroactive.⁴⁶² However, in *Thorpe v. Housing Authority of Durham*,⁴⁶³ the Court applied new regulations retroactively. It held that the appellate court must use the law in effect at the time the decision is made.⁴⁶⁴ The interjection of Dole's memorandum by President Bush also served to muddy the waters. Because of conflicting messages from the court system and the executive branch, this issue is not likely to be resolved before it reaches the U.S. Supreme Court.⁴⁶⁵

Before *Wards Cove Packing Co. v. Atonio*,⁴⁶⁶ decisions regarding disparate treatment were based on *Griggs v. Duke Power*.⁴⁶⁷ The enactment of the 1991 Civil Rights Act restores common law to its state prior to the *Wards Cove* decision. The Act also provides for punitive damages in cases of discrimination.⁴⁶⁸

VII. SUMMARY AND CONCLUSIONS

This Article synthesizes research done over the past eight years. Ronald Reagan was President of the United States from January 1981 to January 1989. In part, the withdrawal of funding for Title VII enforcement may be a victim of its own success; that is, the lack of enthusiasm on the part of the Administration to enforce Title VII may have caused potential claimants to reconsider whether they wanted to file at all. This drop in filings, in turn, may have caused the funding to more closely approximate adequate levels by decreasing the number of cases being processed. Why would victims of discrimination not file with the

MICH. L. REV. 2035 (1992). But cf. Thamer E. Temple III, *Retroactivity of the 1991 Civil Rights Act in Title VII Cases*, LAB. L.J. 299 (1992).

460. Estrin, *supra* note 430, at 2036.

461. 488 U.S. 204 (1988).

462. Estrin, *supra* note 430, at 2038.

463. 393 U.S. 268 (1969).

464. Estrin, *supra* note 430, at 2040.

465. The U.S. Supreme Court granted certiorari to address this issue in the October 1992 Term. *Landgraf v. USI Film Products*, 113 S. Ct. 1250 (1993).

466. 490 U.S. 642 (1989).

467. 401 U.S. 424 (1971).

468. § 102, 105 Stat. 1072-73.

EEOC? Press accounts portray EEOC enforcement efforts as inadequate.⁴⁶⁹

Personnel

The place to start when we talk of changes in enforcement from 1980 to 1989 is the U.S. Supreme Court:

	<u>OCTOBER 1980</u>	<u>OCTOBER 1989</u>	<u>OCTOBER 1993</u>
CHIEF JUSTICE:	Warren Burger	William Rehnquist*#	William Rehnquist
ASSOCIATES:	William Brennan	William Brennan**	David Souter
	Byron White	Byron White****	Ruth Ginsburg
	Thurgood Marshall	Thurgood Marshall***	Clarence Thomas
	Harry Blackmun	Harry Blackmun	Harry Blackmun
	John P. Stevens	John P. Stevens	John P. Stevens
	Potter Stewart	Sandra O'Connor*	Sandra O'Connor
	William Rehnquist	Antonin Scalia*	Antonin Scalia
	Lewis Powell	Anthony Kennedy*	Anthony Kennedy

*Indicates Reagan Appointee

#Indicates Reagan appointment to Chief Justice from Associate Justice

**Resigned on July 20, 1990. President Bush nominated David Souter of New Hampshire.

***Resigned on June 27, 1991. President Bush nominated Clarence Thomas to replace him.

****Resigned on March 19, 1993. President Clinton nominated Ruth Bader Ginsburg to replace him.

In Title VII cases, the "liberal" votes — votes in favor of preserving and expanding precedent — historically came from Justices Brennan, Marshall, and Blackmun, sometimes joined by Justice Stevens.

Of course, much has been made of the fact that when President Reagan left office in January 1989 he had appointed almost one-half of the sitting federal judges.⁴⁷⁰ Although the Reagan Administration started out with a vigorous ideological screening and did not suffer its first loss in Senate judiciary confirmations until the nomination of Jefferson B. Sessions on June 5, 1986, the conservative agenda was slowed in 1986 when the Democrats regained control of the Senate.⁴⁷¹ Also, as Reagan neared the end of his term, the Democrat-controlled Senate Judiciary Committee moved slowly on nominations.⁴⁷² This slow down was matched by a slower administration pace in sending names to the com-

469. *Congressional Study Says Job Bias Cases are Poorly Handled*, N.Y. TIMES, Oct. 12, 1988, at A23.

470. *Id.*; Friedman & Wermiel, *supra* note 26 at 1; Stephen Wermiel, *Tilting Bench: Reagan Choices Alter the Makeup and Views of the Federal Courts*, WALL ST. J., Feb. 1, 1988, at 1.

471. *Washington Whispers*, U.S. NEWS & WORLD REP., Nov. 17, 1986, at 13.

472. Wermiel, *supra* note 37, at A1.

mittee.⁴⁷³ In the last two years of the Reagan term, the White House emphasized nominations of experienced jurists in an attempt to keep ammunition away from hostile Democrats.⁴⁷⁴

Yet, the imprint of the Reagan judges on the federal courts will be evident for decades. For example, in a study performed by two political scientists, Rowland and Karp, district court opinions for the years 1981-85 revealed that Carter appointees voted for those claiming race bias 59% of the time versus 13% of the time for Reagan appointees.⁴⁷⁵ The same study found that Carter appointees found bias against the handicapped 61% of the time compared to a 25% rate for Reagan appointees.⁴⁷⁶ Professors Rowland and Karp, in a study of criminal cases in federal district courts (1981-1984), also found that Carter appointees voted for the defendants 47% of the time; Nixon appointees found for the defendants 32% of the time; and Reagan appointees found for the defendants in only 24% of their rulings.⁴⁷⁷ My earlier study of three-judge appellate court panels in Title VII cases suggested that there may be no statistically significant difference in the way court of appeals judges voted on employment discrimination cases.⁴⁷⁸

The substantial pace of progress against racism and sexism in the United States in the 1960s and 1970s slowed to a halt in the 1980s. Some observers of United States society have openly debated whether the Reagan Administration position on civil rights re-established an old-fashioned racism.⁴⁷⁹ Although figures may vary widely depending on definitions, the number of racist attacks in the United States according to the Justice Department's community relations service increased from 99 in 1980 to 276 in 1986.⁴⁸⁰ In the face of such criticism, Administration spokesmen, journalists, and even President Reagan himself claimed that the Administration was merely trying to root out an invidious form of discrimination manifested in affirmative action quotas, hiring preferences, and school busing orders.⁴⁸¹

473. *Id.*

474. *Washington Whispers*, *supra* note 470, at 13.

475. *Wermiel*, *supra* note 37.

476. *Id.*

477. *Id.*

478. See *supra* text accompanying notes 95-96.

479. See, e.g., Friedrich, *supra* note 332, at 21; Steve France, "Hate Goes to College," *A.B.A. J.*, July 1990, at 44.

480. Friedrich, *supra* note 332, at 20.

481. Joe Davidson & Linda M. Watkins, *Jobs Debate: Quotas in Hiring are Anathema to President Despite Minority Gain*, *WALL ST. J.*, Oct. 24, 1985, at 1.

Part of the problem with the so-called "Doctrine of Original Interpretation" was that it attempted to return the U.S. to the legal thinking of the 18th century. That kind of nostalgia is a soothing way to avoid dealing with the complicated realities of a much more open and pluralistic society in the last years of the 20th century.⁴⁸² Similarly, any attempt to return to the golden age of the civil rights movement from the late 1960s turns on the listener's belief in the existence of such an era. Some argue that no such era existed and that chief among those who did *not* share a "colorblind vision" of America in the 1960s was Ronald Reagan, who vociferously opposed both the 1964 Civil Rights Act and the 1965 Voting Rights Act.⁴⁸³

There is some comfort in the statistical part of this study for those of us on the political left because President Reagan's attempt to clone the judiciary in the image of his Chief Justice appointee, William Rehnquist, has not been entirely successful. On Title VII cases, using an admittedly small sample of cases, there was no statistically significant relationship, using a chi-square test, between voting pattern and Presidential appointment. There certainly seems to be some trend in the direction of voting for business and against civil rights on the part of Reagan's appointees. President Reagan's judicial appointees tended to be heavily male, Republican, and wealthy; that tendency existed to a degree not recently matched by other Presidents.

Additionally, we can state confidently that President Reagan's attempt to put his stamp on affirmative action law through a vigorous campaign orchestrated by Mr. Meese and the Justice Department did not directly bear fruit. Professor Tribe's observations on the unpredictable behavior of Supreme Court appointees,⁴⁸⁴ especially on issues not at the top of the screening list, appears to be supported by the voting patterns of Justice O'Connor.

Statistically, President Reagan had unheralded success in stifling the vigor of Title VII enforcement in this country by tightening the purse strings at a time when his Justice Department policies against class actions and in favor of litigation had created a demand for greater funding to maintain law enforcement effectiveness. Additionally, and we are not able to support this with conclusive statistics but only by an anecdotal

482. See GAIL SHEEHY, *CHARACTER: AMERICA'S SEARCH FOR LEADERSHIP* 237-84 (1990).

483. Michael Kinsley, *On Civil Rights, Conservative Can't Means Won't*, WALL ST. J., June 20, 1985, at 29.

484. TRIBE, *supra* note 15.

approach, the Reagan Administration seems to have had a dramatic but, perhaps, short-lived impact on social attitudes by legitimatizing anti-affirmative action attitudes. Some of the people in our society may also have sensed that it was politically acceptable to be openly hostile to women and minorities in the workplace. To the extent that such attitudes had their genesis in Reagan policies, they may be the most insidious and, perhaps, damaging legacy Ronald Reagan left in the Title VII area.

My initial data indicated the possibility that the most dramatic undermining of civil rights in the Title VII area during the Reagan Administration had occurred in funding for the agency. The perceptions of increased sexism and racism aside, the funding for EEOC enforcement of Title VII, adjusted for inflation and case load, was down 35.4% between fiscal years 1979 and 1984. Since 1984, however, the EEOC budgets have reflected a very small growth in real terms. In absolute terms, the growth is 11% over four years. However, there has been a falling off in the number of complaints received, which results in a slight increase in real terms adjusted for case load. Most, about three-quarters, of the increase in real dollars for enforcement per thousand cases is due to the drop in the number of complaints. The restrained enforcement effort may have helped produce the drop in complaints as employees despaired of help from the EEOC.⁴⁸⁵

To summarize, my conclusions are: (1) that careful ideological screening of federal judicial candidates did not assure President Reagan the "correct" votes on Title VII cases in the short run as measured by conservative ideology; (2) that as late as 1989, Supreme Court decisions did not reflect President Reagan's agenda for Title VII because the makeup of the Court had not changed sufficiently to enable the conservative wing to control results and because, despite excellent conservative credentials, Justice O'Connor had voted with the liberal wing on employment discrimination issues, thereby breaking up the voting block that formerly had given control of Title VII cases to Justice White; (3) that the full impact of President Reagan's appointments to the federal bench may not be known for a decade or more due to the glacial pace of implementing policy change through judicial personnel changes; and (4) that despite the loud and often acrimonious debates over civil rights that occurred between 1980 and 1989, the two most significant impacts of the Reagan years on Title VII enforcement appear to have been the appointment of lower federal court judges who were not sympathetic to

485. David E. Terpstra & Douglas D. Baker, "Outcomes of Sexual Harassment Charges," *ACAD. OF MGMT. J.*, 185, 191 (1988).

claims of discrimination in critical fact-finding situations (i.e. at trial) and the quiet syphoning of funds away from EEOC enforcement efforts at a time when administration policies were creating an environment that called for more enforcement rather than less. If anything, the intense publicity that accompanied some of the more heated policy debates and more controversial appointments provided a tactical diversion by distracting public attention and inquiry from funding and administrative direction of the enforcement agency. The federal "ship of state" in this modern era is much like a supertanker. President Reagan's turn at the helm has changed the ship's course dramatically in the area of Title VII interpretation and enforcement. There is no doubt that it took all of the first term and part of the second to overcome the inertia holding us on the course set in the 1960s and 1970s. The Civil Rights Act of 1991 reversed some of the more extreme case results in exchange for caps on some damages, thereby adjusting our heading. Just how profound the course change will be and how long the helm will stay on this course may not be fully understood until well into the next century.

The battles over the nominations of Robert Bork and Clarence Thomas to the Supreme Court may well have sounded an alarm that triggered a social backlash. Ultimately, a popular President and his heir were not able to convert the judicial appointment power into a judicial repeal of a large part of our employment discrimination laws. Such a radical revision reflecting an ideological extremism lacked fundamental support in the mainstream of U.S. society.⁴⁸⁶ Ironically, the failure of the Bork nomination should have alerted the Reagan-Bush White House that any substantial repeal of rules for employment fairness had to originate with the people and their popularly elected representatives in Congress, not with executive branch appointees.

486. See KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* (1990) (advancing the thesis that a populist center has held in American politics for over 100 years keeping liberal and conservative factions from pulling government policies to radical extremes).